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Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~663~~ 16

ELIZABETH SIMONSON KING, ETC., ET AL.,
PETITIONERS.

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1963
CERTIORARI GRANTED JANUARY 13, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 654

ELIZABETH SIMONSON KING, ETC., ET AL.,
PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. A] [File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff,

v.

GEORGE STEWART KING and NATIONAL SURETY CORPORATION, a Corporation of the State of New York, Defendants.

APPENDIX

DOCKET ENTRIES

Civil 749-58

Date	Filings—proceedings	Amount reported in emolument returns
7- 8-58	Complaint, filed 7-3-58	V
7- 8-58	Summons issued	V
7- 8-58	Notice of Allocation and Assignment, filed. (Newark-Wortendyke.)	V
7-29-58	Summons returned served on National Surety Corp. on 7-14-58; served on George Stewart King on 7-22-58, filed 7-28-58	V
8- 6-58	Stipulation and order extending time of National Surety Corp., to answer to 8-28-58, filed. (Smith.) Notice mailed	V
8-13-58	Stipulation and order extending time of George Stewart King to answer to 9-11-58, filed 8-12-58. (Hartshorne.) Notice mailed	V
8-28-58	Stipulation and order extending time of National Surety Corp. to answer to 10-2-58, filed 8-27-58. (Wortendyke.) Notice mailed	V

Date	Filings—proceedings	Amount reported in emolument returns
10- 1-58	Defendant's (George S. King) notice of motion for summary judgment, returnable 11-24-58 and acknowledgments of service filed 9-30-58. (No brief.)	V
10- 3-58	Notice of motion of National Surety Corp., for summary judgment, returnable 11-24-58 filed 10-2-58. (No brief.)	V
10- 3-58	Affidavit of Service of copy of motion for summary judgment filed 10-2-58	V
11-14-58	Stipulation and order adjourning motions to dismiss complaint to 12-8-58, filed 11-13-58. (Wortendyke.) Notice mailed	V
2-25-59	Ordered hearing on motion of George Stewart King, for summary judgment adjourned without date. (Wortendyke.) (2-24-59.)	
2-25-59	Ordered hearing on motion of National Surety Corp., for summary judgment adjourned without date. (Wortendyke.) (2-24-59.)	
4-10-59	Notice of motion by plaintiff to substitute party defendant, and affidavit of service, filed 4-9-59 (ret. 4-27-59). (No brief submitted.)	V
4-15-59	Copy of notice of motion by plaintiff to substitute party defendant, with Marshal's return thereon, filed	V
4-28-59	Proclamation made of plaintiff's motion to substitute party defendant. Counsel indicated consent order to be submitted. (Wortendyke.) (4-27-59.)	
5-20-59	Substitution of attorney for defendant George Stewart King, filed	V

Date	Filings—proceedings	Amount reported in emolument returns
6-16-59	Consent order substituting party defendant, filed 6-15-59. (Wortendyke.) Notice mailed	V
9-16-60	*Answer* of National Surety Corporation filed	V
10- 3-60	*Answer* of Elizabeth Simonson King, as Executrix, etc., filed	V
1- 4-61	*Pre-trial Conference* (Wortendyke.) (1-3-61.)	
1-12-61	Order re pre-trial transcript, filed 1-11-61. (Wortendyke.) Notice mailed	V
1-17-61	Transcript of pre-trial conference, filed 1-16-61	V
6-19-61	Stipulation of Facts filed	V
9-13-62	Opinion, filed. (Wortendyke.) (Complaint to be dismissed.) (Copy forwarded to U.S. Attorney General, Washington, D.C.)	V
10- 9-62	Order of Dismissal without costs, filed 9-8-62. (Wortendyke.) Notice mailed	V
12- 6-62	Notice of Appeal filed 12-3-62	V
12- 6-62	Copies of notice of appeal sent to Crummy, Gibbons & O'Neill, Esqs., Boyd, Dodd, Keer & Booth, Esqs., and Clerk, U.S.C.A.	
1- 2-63	Record on Appeal forwarded to Clerk, U.S.C.A.	

[fol. 2]

IN UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

UNITED STATES OF AMERICA, Plaintiff,

v.

GEORGE STEWART KING and NATIONAL SURETY CORPORATION, a Corporation of the State of New York, Defendants.

COMPLAINT

The plaintiff, United States of America, by Chester A. Weidenburner, United States Attorney for the District of New Jersey, appearing by Barbara A. Morris, Assistant United States Attorney, brings this action of a civil nature against George Stewart King, individually and as Distributing Agent of Seeley Tube & Box Company, and against National Surety Corporation, under the provisions of Title 28 U.S.C. 1345 and says:

Count 1

1. Defendant, George Stewart King, resides in the Town of Montclair, County of Essex, within the District of New Jersey.

2. On October 1, 1946, Seeley Tube & Box Company, Inc., a corporation of the State of New Jersey, filed a Petition for Reorganization under Chapter XI of the Bankruptcy Act (11 U.S.C. 732.) Pursuant to an Order of Referee Cahill filed on March 22, 1947, the defendant, George Stewart King, was appointed Distributing Agent and entered into performance of the duties of that office. On the same date, the defendant filed a bond in the amount of $10,000 for faithful performance of his duties. On March 21, 1952, by order of Referee Cahill, the bond was reduced to $4,000.

[fol. 3] 3. The schedules accompanying the said petition did not list the United States as a creditor, however, contract #W-28-017-ORD-1240 dated June 24, 1946 and contract #W-28-017-ORD-1207 dated June 13, 1946 between the Picatinny Arsenal, War Department, United States of America, and the Seeley Tube & Box Company, Inc., were listed as executory contracts.

4. On November 18, 1946, because of the bankrupt company's default, the aforesaid contracts were terminated by letter directed by the United States Army to Seeley Tube & Box Company, Inc.

5. On February 28, 1947, leave was granted to file an amended plan of arrangement providing for payment in full to all unsecured creditors. The said amended plan was confirmed, following a hearing on March 24, 1947. In the course of that hearing, counsel for the defendant admitted the existence of the Government's claim and represented to Referee Schenck that there was then available $94,000 and that there would be available at all times the sum of $20,000 for payment of that claim.

6. Thereafter, by order of the Bankruptcy Court dated April 14, 1947, the United States was directed to file its claims against Seeley Tube & Box Company, Inc. on or before May 9, 1947.

7. On May 9, 1947 the Government filed a proof of claim for $26,818.82 asserting priority under the provisions of 11 U.S.C. 104, 737 and 702 and Sections 3466 and 3467, as amended, of the Revised Statutes, U.S.C. 191, 192. On March 30, 1949, after the damages sustained by the Government had been more accurately determined, an amended proof of claim for $34,125.03 was filed.

8. On February 17, 1950, the defendant, on behalf of Seeley Tube & Box Company, Inc., petitioned the Bankruptcy Court to re-examine the Government's claim alleg-[fol. 4] ing, among other things, that the Government's proofs of claim were not filed within time.

9. On December 8, 1953, following the hearing on the aforesaid petition for re-examination, Referee Cahill dis-

termined that the claim of the United States was filed in time and that the amended plan of the bankrupt corporation had been confirmed upon the condition that adequate provision had been made for payment of the Government's claim in the event it was determined allowable in an amount not in excess of $94,000.

10. On April 2, 1954, Referee Cahill's determination was reversed by the United States District Court for the District of New Jersey (by order of Honorable Alfred E. Modarelli, United States District Court Judge).

11. An appeal was taken from the District Court's ruling and on January 1, 1955 the Court of Appeals for the Third Circuit reversed and held that defendant's counsel's representations at the hearing on the confirmation was tantamount to an informal amendment of the bankrupt's schedules and the Government had become a creditor at that time.

12. On February 9, 1955 the Court of Appeals for the Third Circuit denied a rehearing; on October 1, 1955 certiorari was denied by the Supreme Court of the United States.

13. By order of Referee Tallyn dated August 2, 1956, the reorganization proceeding was concluded, the defendant discharged as distributing agent and the bond issued by the National Surety Company was cancelled. The Government did not receive notice of termination of these proceedings.

14. The Final Petition and Report of the distributing agent, a copy of which is attached hereto and marked Exhibit "A", filed on May 3, 1956, reflects that assets in [fol. 5] the amount of $160,193.68 were distributed to creditors and that on the date of filing, there remained for application to the Government's claim for $34,125.03, the sum of $3,620.39 despite the fact that the United States was a priority creditor under the provisions of 11 U.S.C. 104 and 31 U.S.C. 191.

15. Distribution of assets as aforesaid were made in violation of 31 U.S.C. §191 and 192.

16. Demand has been made upon the defendant, George Stewart King, by the plaintiff for the sum of $34,125.03. Seeley Tube & Box Company, Inc. has been credited with the sum of $1,486.33; additionally, payments totalling $6,807.62 have been received from the bankrupt company and there remains due to the plaintiff the sum of $25,831.08.

Wherefore, plaintiff, United States of America, demands of the defendant, George Stewart King, the sum of $25,831.08 together with interest and costs of suit to be taxed.

Count II

1. The defendant, National Surety Corporation, a New York corporation, has its place of business in Newark, New Jersey, within the jurisdiction of this court.

2. On or about May 17, 1947, the National Surety Company, as surety, made and executed a certain performance bond binding it to the United States of America in the amount of $10,000 to secure faithful performance by George Stewart King of his duties as distributing agent of the Seeley Tube & Box Company, now known as the National Surety Corporation, the defendant herein.

3. Plaintiff repeats the allegations of paragraphs 2 through 16 of the First Count of the complaint.

[fol. 6] 4. Demand has been made upon the said defendant as surety for the aforesaid sum of $10,000 inasmuch as the individual defendant, George Stewart King, has failed to distribute to the United States of America the amount to which it was entitled in the aforementioned reorganization proceeding.

5. The defendant surety company which has guaranteed performance has declined to complete its contract as surety.

Wherefore, plaintiff, United States of America, demands of the defendant, National Surety Corporation, judgment in the sum of $10,000.

Chester A. Weidenburner, United States Attorney.
By Barbara A. Morris, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER OF ELIZABETH SIMONSON KING
Filed October 3, 1960

Defendant, Elizabeth Simonson King, as Executrix of the Estate of George Stewart King of Montclair, Essex County, New Jersey, says:

Answer to First Count

1. She admits the allegations of paragraph 1 and 2 of the complaint herein as of the date of the filing of said complaint but says that George Stewart King has since died leaving an insolvent estate.

2. She has insufficient knowledge and therefore denies the allegations of paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the complaint except that she admits George Stewart King was properly discharged as distributing agent.

[fol. 7] Answer to Second Count

1. She has insufficient knowledge and therefore denies the allegations of paragraphs 1, 2, 3, 4 and 5 of the second count of the complaint herein.

First Separate Defense

The obligation of the Distributing Agent was to distribute the funds in compliance with the Order of the Bankruptcy Court. Each and every check signed by the Distributing Agent was pursuant to an Order entered by the Court. This being the case, this defendant cannot be liable for the compliance with the Orders of the Court.

Second Separate Defense

The plaintiff had the right to commence an action against distributees of the estate for the amount by which they were unjustly enriched by virtue of the fact that the plaintiff's priority claim was not paid from the estate. The plaintiff, knowing of this fact, elected not to institute such an action

and elected to defer institution of a suit against the defendants until long after the Statute of Limitations had run on any suit against the distributees. As a result of this, this defendant would have no right to recover from any of the distributees the amounts paid to them in excess of their entitlement from the estate. The plaintiff is, therefore, estopped from maintaining this action against the defendant, Elizabeth Simonson King as Executrix of the Estate of George Stewart King.

[fol. 8] Third Separate Defense

The plaintiff has failed to state a cause of action upon which relief can be granted.

Boyd, Dodd, Keer & Booth, Attorneys for the Defendant, Elizabeth Simonson King, as Executrix of the Estate of George Stewart King. By David S. Bate, A member of the firm.

In United States District Court

Answer of National Surety Corp.—
Filed September 16, 1960

Defendant, National Surety Corporation, a corporation of the state of New York, with its principal office in this state at 820 Broad Street, Newark 2, New Jersey, says:

Answer to First Count

1. The defendant admits to Paragraphs 1 and 2 of the complaint.

2. The defendant has insufficient knowledge and, therefore, denies the allegations of Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint.

3. The defendant admits the allegations of Paragraph 13 of the complaint except that it denies that the plaintiff did not receive notice of the termination of the proceedings. The defendant denies the allegations of Paragraphs 14, 15 and 16 of the complaint.

Answer to Second Count

1. The defendant admits the allegations of Paragraphs 1 and 2 of Count II of the complaint.

2. The defendant repeats its answers of Paragraphs 3 through 16 of the First Count of the complaint.

3. The defendant admits that a demand has been made upon it in the amount of $10,000 but denies that the Dis- [fol. 9] tributing Agent failed to perform any obligation owed to the plaintiff.

4. The defendant denies the allegations of Paragraph 5 of the Second Count of the complaint.

First Separate Defense

The obligation of the Distributing Agent was to distribute the funds in compliance with the Order of the Bankruptcy Court. The obligation of the surety was only conditioned upon the performance of the Distributing Agent of the terms of the Order of the Court. Each and every check signed by the Distributing Agent was pursuant to an Order entered by the Court. This being the case, the surety cannot be liable for the compliance by the principal with the Orders of the Court.

Second Separate Defense

The plaintiff had the right to commence an action against distributees of the estate for the amount by which they were unjustly enriched by virtue of the fact that the plaintiff's priority claim was not paid from the estate. The plaintiff, knowing of this fact, elected not to institute such an action and elected to defer institution of a suit against the defendants until long after the Statute of Limitations had run on any suit against the distributees. As a result of this, the defendants would have no right to recover from any of the distributees the amounts paid to them in excess of their entitlement from the estate. The plaintiff is, therefore, estopped from maintaining this action against the defendant, National Surety Corporation.

[fol. 10] Third Separate Defense

The plaintiff has failed to state a cause of action upon which relief can be granted.

Crummy, Gibbons & O'Neill, Attorneys for Defendant, National Surety Corporation. By Paul T. Murphy, A Member of the Firm.

In United States District Court

Order of Referee in Bankruptcy, March 17, 1947, paragraph 2

2. G. Stewart King is hereby appointed distributing agent of Seeley Tube & Box Company, debtor, and the debtor is hereby directed to deposit with said G. Stewart King as disbursing agent, on or before March 19, 1947 the consideration to be distributed to creditors, the money necessary to pay all debts which have priority, and the money necessary to pay the costs and expenses of the proceedings in such amounts as the court may determine; the said distributing agent being hereby directed on receipt of such consideration to deposit said funds in an account to be opened in any qualified bankruptcy depository in this district, subject to the control and order of this court.

In United States District Court

Order in Bankruptcy, March 21, 1947, paragraph 2

2. G. Stewart King, as distributing agent of debtor be, and he is hereby authorized, directed and empowered to distribute the monies deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and counter signed by this Court in accordance with the terms of the orders of dis-[fol. 11] tribution to be hereafter made and entered by the Court;

In United States District Court

Opinion of District Court—September 13, 1962

Wortendyke, District Judge: This action is against the executrix of a deceased Distributing Agent for a bankrupt in a Chapter XI proceeding, under 11 U.S.C. §§ 701, et seq., to recover the amount of a debt due from the Debtor to the United States, and also against the surety upon the Agent's bond (to the extent of the penalty of $10,000 thereof). Plaintiff bases its alleged right to recover upon the provisions of 31 U.S.C. § 192.[1] Plaintiff asserts the priority (31 U.S.C. § 191) of its claim against cash assets of Debtor in the hands of the Agent which were disbursed by the Agent to non-priority creditors of the Debtor. The Agent died testate, after the commencement of this action, and his executrix was substituted as a defendant in his stead. The case has been submitted to the Court, sitting without a jury, upon the following stipulation of facts:

> This stipulation is entered into by and between the United States of America as plaintiff and Elizabeth Simonson King as personal representative of George Stewart King, defendant, deceased, and National Surety Corporation.
>
> Paul T. Murphy, Esquire, is appearing for National Surety Corporation, and has been authorized by David S. Bate, Esquire, of Boyd, Dodd, Keer & Booth, Es-[fol. 12] quires, to appear on behalf of the defendant Elizabeth Simonson King for the purpose of making the within stipulation.
>
> This stipulation is made pursuant to the direction of the Court contained in the pretrial order dated January 3, 1961.

---

[1] This section provides that every "executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for * * * which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It is stipulated by and between the parties hereto that the following facts shall constitute the record in the trial of this cause without testimony or proof on behalf of any party, subject to objections, if any, as to materiality and relevancy, and subject to the right of any party to introduce at the trial of the cause any evidence not inconsistent herewith upon five days notice prior thereto to all parties:

1. There is jurisdiction in this court by virtue of the status of the plaintiff, the United States of America. This action was commenced on July 3, 1958.

2. On October 1st, 1946, Seeley Tube and Box Company, Inc., a corperation of the State of New Jersey, filed a petition for reorganization under Chapter XI of the Bankruptcy Act (11 U.S.C.). Pursuant to an order of Referee Cahill entered on March 17, 1947, and filed on March 22, 1947, the deceased George Stewart King was appointed distributing agent and entered into performance of the duties of that office. On the same date the deceased George Stewart King filed a bond of the Defendant National Surety Corporation in the amount of $10,000 for the faithful performance of the duties of George Stewart King. On March 21, 1952, by order of Referee Cahill the bond was reduced to $4,000.

3. The claim of Plaintiff United States of America arose out of default of Seeley Tube and Box Company, Inc., under contracts dated July 13 and 24, 1946, with the United States, and represents the excess costs incurred by the United States in completing the con- [fol. 13] tracts. Two letters dated October 11, 1946, were addressed to the debtor by the Ordinance Department, Dover, New Jersey, advising of an intention to terminate the contracts because of default, and on November 18 and 19, 1946, debtor was notified by the Ordinance Department of the termination of the contracts and of the intention to hold the debtor liable for any excess costs.

4. The Plaintiff United States of America was not scheduled as a creditor in the petition filed by the debtor corporation. The contract between the plaintiff and debtor corporation was listed as an executory contract on the schedules annexed to the petition.

5. An amended plan of arrangement was confirmed following a hearing on March 21, 1947.

6. The debtor corporation deposited with the distributing agent the sum of $160,193.68 in order to consummate the plan of arrangement. This sum was distributed pursuant to orders of the Court by checks signed by the distributing agent and countersigned by the referee. No written provision was contained in the plan of arrangement for payment of plaintiff's claim.

7. Part of the statement made on the record on March 21, 1947, by the Referee and the attorney for the debtor was as follows:

"The Referee. Is there a claim of the Picatinny Arsenal?

"Mr. Freeman. The Picatinny Arsenal may have some claim.

"The Referee. Have we put up enough money to meet it?

"Mr. Freeman. No.

"The Referee. Is there a problem there?

"Mr. Freeman. We do not owe them any money, and we want to bring them in. I want to state to your Honor further that the debtor company will deposit any sum of money that is represented by any claim [fol. 14] that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it.

"The Referee. Have you any notion of what they might claim?

"Mr. Freeman. We think they may claim $20,000.

"The Referee. Have you $20,000 available?

"Mr. Freeman. We have $94,000 available to pay them if necessary, and we represent to your Honor

that there will be at all times $20,000 or more available to dispose of that claim, in cash * * *

* * * * * * *

"Mr. Freeman. I have a further application to limit the time of the United States of America to file a claim in this proceeding. And I am now handing your Honor a petition and order to show cause.

"The Referee. There is a provision in the statute—

"Mr. Freeman. Yes, there is.

"The Referee. I want to see it.

"Mr. Freeman. It is Section 369.

"The Referee. Section 369 says under proved debts:

"'1. Have been proved but not allowed or disallowed, prior to the date of confirmation; or "unliquidated debts."

"'2. Are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the Court may direct; or "Arising from rejection of executory contracts."

"'3. Arise from the rejection of executory contracts by the debtor and are proved within such time as the Court may direct.'"

This comes within the last category.

"Mr. Freeman: Yes; that is the last category.

"The Referee: Well, I will sign this order and let Miss Robinson fix the date. * * *"

[fol. 15] The records of the Clerk of the Bankruptcy Court reflect the appearance of "G. Stewart King", distributing agent and president of the debtor corporation, in court on that date.

8. On April 14, 1947, an order was entered directing the United States of America to file its claim on or before May 9, 1947.

9. On May 9, 1947, the United States of America filed its preliminary contingent proof of claim in the

amount of $26,818.82. The aforesaid claim alleged that the United States of America was a priority creditor.

10. On May 9, 1947, the distributing agent had in his hands the sum of $6,085.01, which was subsequently distributed as follows:

United States of America	$3,620.39
Creditors having a priority to United States of America	1,057.55
Creditors not having a priority	1,407.07
	6,085.01

11. Each check was issued pursuant to an order of the Court and countersigned by the Referee in Bankruptcy.

12. On March 30, 1949, the plaintiff amended its claim to $34,125.03, the final amount of the claim as allowed.

13. On December 8, 1953, Referee Cahill determined that the claim of the United States was filed in time and that the amended plan of the bankrupt corporation had been confirmed upon the condition that adequate provision had been made for payment of the Government's claim in the event it was determined to be allowable in an amount not in excess of $94,000.

14. On April 2, 1954, Referee Cahill's determination was reversed by the United States District Court for the District of New Jersey by Order of the Honorable Alfred E. Modarelli, United States District Court Judge.

15. An appeal was taken from the District Court's ruling, and on January 1, 1955, the Court of Appeals for the Third Circuit reversed and held, "The dis- [fol. 16] closure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefore in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." Rehearing was denied on February 9, 1955. Certiorari was denied on October 1, 1955, by the United States Supreme Court.

16. On May 3, 1956, the distributing agent filed his final report and account with the clerk of the bankruptcy court.

17. On August 2, 1956, the final report and account was allowed, the distributing agent was discharged and the surety bond was discharged.

18. The Defendant National Surety Corporation received its first notice of any claim under its bond by letter dated May 7, 1958, from the plaintiff demanding payment of the sum of $4,000, being the reduced amount of its bond.

In addition to the foregoing it is stipulated that any party may offer all or any part of any pleading or other record on file in the matter of Seeley Tube and Box Company, Inc., Debtor, subject to objections as to materiality and relevancy.

It is further stipulated that the foregoing stipulation shall be filed with the court by the attorney for Defendant National Surety Corporation within one week of the date that copies of the foregoing stipulation are mailed to the attorneys for the respective parties, and that in the event any attorney for any party has objection to any provision of the foregoing stipulation such objection shall be made known prior to the filing of the within stipulation with the court, and that the stipulation shall be filed without the necessity of execution by the attorneys.

(Certified a true copy by Ashley B. Carrick, C.S.R.)

(Filed June 9, 1961.)

[fol. 17] I find the facts as stipulated. In sum, King, a distributing agent, appointed by a Referee in Bankruptcy pursuant to 11 U.S.C. § 737(1), to receive and distribute, "subject to the control of the Court" a fund of $160,193.68 deposited by Seeley Tube and Box Company, Inc., Debtor, under Chapter XI of the Bankruptcy Act, did, between March 21, 1947 and March 7, 1956, pay and distribute to other creditors of Debtor all but $3,620.39 of the moneys

in his hands, before paying a debt of $34,125.03 due to the United States from the Debtor. National Surety Corporation, as surety, with King as principal, gave bond in the penal sum of $10,000, pursuant to the Referee's order of March 17, 1947, conditioned for the performance by King of his duties as Distributing Agent for Seeley Tube and Box Company, Inc., Debtor, under Chapter XI of the Bankruptcy Act. After allowance of a credit to the Debtor in the sum of $1,486.33 and deduction of a receipt from the Debtor of $6,807.62, there remained due to the United States, as a priority creditor, on the date of the commencement of this action (July 3, 1958) the sum of $25,831.08. However, all of the moneys which were deposited with the Distributing Agent, except $6,085.01, had been paid out by him, in compliance with the Referee's orders, *before May 9, 1947*, the date on which the Government's preliminary, contingent proof of claim for $20,818.82 was filed, which was not amended to the amount of $34,125.03 until March 30, 1949. The plan of arrangement contained no written provision for payment of plaintiff's claim out of the sum deposited with the Distributing Agent.

Discussion

On March 21, 1947, during the course of a hearing before the Referee in Bankruptcy, upon the application of [fol. 18] the Debtor for confirmation of an amended plan of arrangement, and in the presence of George Stewart King, the Referee inquired respecting a contingent claim of the Government in connection with a contract or contracts between the Debtor and Picatinny Arsenal, an agency of the Government. This contingent claim had not originally been listed in the Debtor's bankruptcy schedules. The attorney for the Debtor admitted that the Government might have some claim, and in response to the Referee's further inquiry, estimated that the claim might amount to $20,000, and added: "We have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim in cash." At the time the foregoing representation was made, King had already been appointed

Distributing Agent of the Debtor by the Order of the Referee dated March 17, 1947, which directed the giving of the bond hereinbefore referred to.

Annexed to the complaint in this case as an exhibit is a document purporting to be an unexecuted copy of the final petition and report of the Distributing Agent to the Referee in Bankruptcy, setting forth that on March 17, 1947 the Agent deposited in his official account the sum of $160,193.68, and listing a succession of 92 checks of various dates between March 21, 1947 and March 7, 1956, in varying amounts, to various payees, aggregating the amount of the bank deposit. Included in these disbursements was that of March 7, 1956 to the United States of America, purporting to be "on account" of the Government's claim, and represented to be the balance in the hands of the Agent. Leave was granted to the Government to file its claim on or before May 9, 1947 by the Referee's order of April 14, 1947. The Government's claim was filed within the time limited. [fol. 19] On February 17, 1950, during the course of the performance of his duties as Distributing Agent, King petitioned the Bankruptcy Court to reexamine the Government's claim and contended that it was not filed within time. By his Order of December 8, 1953, the Referee determined that the Government's claim had been timely filed, in the amount of $34,125.03. Although the District Court reversed the Referee's determination in this regard on April 2, 1954, the Third Circuit Court of Appeals reversed the District Court on January 1, 1955 and denied a rehearing thereon on February 9, 1955. Certiorari was denied by the Supreme Court of the United States on October 1, 1955.

By his order of August 2, 1956, the Referee discharged King as Distributing Agent and cancelled his bond without notice to the plaintiff.

In the light of the facts set forth in the Stipulation and disclosed by the record in the bankruptcy proceedings involving Seeley Tube and Box Company, the Government's reliance in this action upon the provisions of 31 U.S.C. § 192 is misplaced. At the outset, the question is posed whether King, by virtue of his appointment by the Referee in Bankruptcy as Distributing Agent in the Chapter XI proceedings, thereby became included in the category of

those whose liability is created by the language of the statutory section relied upon. In other words, we are here called upon to determine whether King was an "executor, administrator or assignee or other person" who paid "any debt due by the person or estate for whom or for which he acts" before satisfying the debts due to the United States from such person or estate. An analogous question was before the Court in *United States v. Stephens*, 5 Cir. 1953, [fol. 20] 208 F. 2d 105. In that case the statute here relied upon was sought to be applied to the Receiver of an insolvent in a state court proceeding, and the Court of Appeals affirmed the District Court in dismissing the action upon the ground that the Receiver was not within the category to which liability under the statute would extend. The Stephens case, in construing and interpreting the statute, adhered to the principle that an action based entirely upon the statute "must find its warrant in the statute" precluding a Court "upon the pretense of construing it" from enlarging "its coverage to bring within it those not expressly or by clear intendment embraced within its terms." (P. 107.) By applying that test the Court necessarily reached the conclusion not only that a Receiver was *not* among the persons expressly mentioned by the statute, but that the Receiver's custody of property in the insolvency proceeding was "that of the law or of the court" and that the actions of the Receiver in taking and retaining custody were those of an agent of the court. Since, therefore, the Receiver was a ministerial officer acting as an arm of the Court, he derives his authority from the Court and is subject only to its order. In rejecting the contention that the Receiver there involved was within the phrase "or other person" employed in the statute, the Court, in Stephens, limited the category described by that phrase "to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any debt due *by the person or estate for whom or for which he acts.*'" (P. 108.) The dismissal of the action in the Stephens case was affirmed because of the *failure* of the Government to show "that the defendant is either an executor, administrator or assignee of the debtor; or, if not, that he

[fol. 21] stands to the debtor as agent or in some other representative capacity and, as such agent or representative, has paid the debt due the United States; and that thus, as such agent or representative, he has defeated the priority accorded to debts of the United States." (P. 103.)

A later case based upon section 192 and involving a Receiver, *United States* v. *Crocker*, D.C. Nev. 1951, 194 F. Supp. 860, cited and followed the Stephens case, supra. *In re J. B. Pollack Co.*, 2 Cir. 1936, 86 F. 2d 99, relied upon by the Government, is distinguishable from Stephens, supra, and from the case at bar, because the distributing agent in Pollack made the payments which depleted the fund without a proper Court order.

In re Empire Shoe Corp., D.C.N.Y. 1936, 16 F. Supp. 713, denied a creditor's claim against a distributing agent where the agent had relied on the Court's order in making his distribution and had not acted in bad faith.

In the case at bar, King was not an executor, administrator or assignee, or other person, who acted for the Debtor by paying Debtor's general creditors before paying the debt owned by the Debtor to the United States. An examination of the Referee's order of March 17, 1947 reveals that it directed the Debtor to deposit with King, as Distributing Agent, on or before March 19, 1947, the consideration to be distributed to creditors, the money necessary to pay all debts which had priority, and to pay the costs and expenses of the proceedings as the Court might determine. The same order directed King, as Distributing Agent, on receipt of such moneys, to deposit them in an account to be opened by him in any qualified bankruptcy depository in the District, *subject to the control and orders of the Bankruptcy Court*. The Plan of Arrangement came [fol. 22] on for hearing and confirmation on March 21, 1947, and on that day King, as Distributing Agent, was directed to distribute the moneys which had been deposited with him "by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court * * *." Further, on the same date, the Referee signed orders and arrangement sheets upon the authority of which King prepared,

signed and sent to the Referee for countersignature, checks in the indicated amounts, to the named payees totalling $149,422.20. On the basis of further arrangement sheets, signed by the Referee on March 28, 1947, additional checks were signed by King and sent to the Referee for countersignature in a total amount of $4,995.40.

It was not until May 9, 1947 that the Government filed its liquidated claim for $26,818.82, which was amended on March 30, 1949 to $34,125.03, and ultimately allowed as amended. When the Government's claim was initially filed in a liquidated amount there remained in the hands of the Distributing Agent only $6,085.01. The remainder of the moneys which had been deposited with him had theretofore been disbursed by him by checks signed by him and countersigned by the Referee, all upon specific orders of the Referee.

Of this balance of $6,085.01, $3,620.39 was subsequently paid on account of the claim of the United States, and $1,057.55 was paid to claimants having statutory priority to the claim of the United States. On May 3, 1956, after the Distributing Agent had paid out all of the moneys in his possession, he filed his final report, and obtained an [fol. 23] approval of his account and discharge from his office, together with the cancellation of his bond.

I do not reach the contention of the defendants that the Government is precluded from recovering in this action by reason of having *waived* its right to priority in the funds in the hands of King through failure to assert its right while the funds remained in the Distributing Agent's possession.

Liability of the defendant surety is dependent upon the liability of its principal. Since I have concluded that King was not liable under Section 192, no liability can be imposed upon the surety upon his bond.

Conclusions of Law

1. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. #1345.

2. This Court has jurisdiction of the parties to this action.

3. The evidence fails to support the cause of action alleged in the complaint, which should be, and accordingly is, dismissed.

Submit an appropriate order.

Reynier J. Wortendyke, Jr., Judge, United States District Court.

IN UNITED STATES DISTRICT COURT

ORDER OF THE DISTRICT COURT—October 8, 1962

This matter having been opened to the Court by the attorney for the plaintiff, United States of America, David M. Satz, Jr., Esq., United States Attorney, James D. Butler, Esq. appearing; and the defendant, Elizabeth Simonson King, Executrix of the Estate of George Stewart King being represented by Boyd, Dodd, Keer & Booth, Esqs., David S. Bate, Esq. appearing; and the defendant, National Surety Corporation being represented by Crummy, Gibbons [fol. 24] & O'Neill, Esqs., Paul T. Murphy, Esq. appearing; and the parties having entered into a Stipulation of Facts, which Stipulation has been filed in the cause; and the Court having considered the Stipulation of Facts and the briefs submitted on behalf of all parties; it is on this 8th day of October, 1962,

Adjudged:

1. The facts are found as stipulated;

2. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1345;

3. This Court has jurisdiction to the parties of this action;

4. The evidence fails to support the cause of action alleged in the Complaint and judgment be and it is hereby entered dismissing the Complaint without costs.

Reynier J. Wortendyke, Jr., U.S.D.J.

We consent to entry of the within Judgment as to form.

David M. Satz, Jr., United States Attorney, Attorney for Plaintiff. By James D. Butler, Esq., Assistant United States Attorney.

Boyd, Dodd, Keer & Booth, Attorneys for Defendant, Elizabeth Simonson King. By David S. Bate.

Crummy, Gibbons & O'Neill, Attorneys for Defendant, National Surety Corporation. By Paul T. Murphy.

[fol. 25]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,776

UNITED STATES OF AMERICA, Appellant

v.

A. D. CROCKER, Appellee

Appeal from the United States District Court for the District of Nevada.

OPINION IN UNITED STATES V. CROCKER—February 15, 1963

Before: Merrill and Browning, Circuit Judges, and Pence, District Judge.

Browning, Circuit Judge: The United States filed a complaint alleging that appellee, a receiver appointed by the Superior Court of the State of California, took possession of assets of a certain debtor, sold them, and distributed the proceeds to creditors other than the United States, although appellee knew that the debtor was insolvent and indebted to the United States for unpaid taxes. The complaint prayed for a personal judgment against appellee in the amount of the unpaid tax, based upon 31 U.S.C.A. § 192. The District Court dismissed the action on the ground that Section 192 is inapplicable to court-appointed receivers.[1]

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[1] 194 F. Supp. 860 (D. Nev. 1961).

[fol. 26] Sections 191[2] and 192[3] of Title 31 are part of a common statutory scheme,[4] the language of which is to be liberally construed to effectuate its public purposes.[5]
[fol. 27] Section 191 provides that debts due to the United States shall have priority when a decedent's estate is insufficient to satisfy all of its debts, or when a living debtor is insolvent and his insolvency is manifested in one of the ways specified in Section 191; i.e., by assignment for the

[2] "Whenever any person indebted to the United States is insolvent or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 U.S.C.A. § 191; Rev. Stat. § 3466.

[3] "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid." 31 U.S.C.A. § 192; Rev. Stat. § 3467, as amended.

[4] *United States* v. *Lutz*, 295 F. 2d 736, 742-43 (5th Cir. 1961). The provision for priority of debts due the United States, now found in Section 191, was enacted in its original form in 1789. *Price* v. *United States*, 169 U.S. 492, 500 (1926). The provision for personal liability of fiduciaries, now found in Section 192, was added in 1799, initially as a clause interposed between the two present clauses of Section 191. Act of March 2, 1799, c. 22, § 65, 1 Stat. 676. See *Conard* v. *Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 438-39 (1828). The present arrangement was adopted in incorporating these provisions in the Revised Statutes, and "did not work any change in the purpose or meaning." *Price* v. *United States*, 269 U.S. at 501.

[5] The statute "is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts." *United States* v. *State Bank*, 31 U.S. (6 Pet.) 29, 34 (1832). "As this statute has reference to the public good, it ought to be liberally construed." *Boston* v. *Farmers' Bank*, 37 U.S. (12 Pet.) 102, 134 (1838).

benefit of creditors, by attachment of the effects of an absconding, concealed, or absent debtor, or by an act of bankruptcy. When the conditions establishing this priority under Section 191 are satisfied, the property of the debtor will ordinarily have passed to the control of a third person, and Section 192 provides that the preferred obligation to the United States is then to be satisfied "by the assignees, who are rendered personally liable, if they omit to discharge such debt or debts." *Conard* v. *Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 438 (1828). "When the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property." *United States* v. *Oklahoma*, 261 U.S. 253, 260 (1923). And the statute does not require transfer of title or establishment of a formal trust; "divestment of possession and control without technical transfer of title is enough to bring the statute into operation."[7]

In *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483 (1926), the Supreme Court sustained the holding of this Court that debts due the United States were entitled to [fol. 28] priority under Sections 191 and 192 when possession and control of the property of an insolvent bank were transferred to the Superintendent of Banks of the State of Oregon for liquidation. It was argued that Section 191 did not apply. The Court said:

> The specification in § 3466 [Section 191] of the ways insolvency may be manifested is aided by the designation in § 3467 [Section 192] of the persons made answerable for failure to pay the United States first from the inadequate estates of deceased debtors or from the insolvent estates of living debtors. The per-

[7] See also *United States* v. *Kaplan*, 74 F. 2d 664, 666 (2d Cir. 1935). Section 191 "has no application to a payment by a stranger occupying no fiduciary capacity, as in the case of a debt due in the usual course of business to a solvent debtor." *United States* v. *Western Union Tel. Co.*, 50 F. 2d 102, 103 (2d Cir. 1931).

[8] 63 Yale L.J. 905, 906 n. 8 (1954). See *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483, 489-91 (1926).

sons held are "every executor, administrator, or assignee, or *other person*." The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear. (269 U.S. at 490.)

It follows, and the cases have held, that a receiver appointed by a federal or state court who takes possession and control of the assets of an insolvent debtor must first satisfy obligations due the United States under Section 191.[8] It likewise follows that a receiver who knowingly [fol. 29] distributes the assets in disregard of that priority is to be personally liable under Section 192.[9] It would be inconsistent with the scheme of Sections 191 and 192, and at odds with their purpose and with the rationale of *Bramwell*, to exclude receivers from personal liability under Section 192 when the conditions for priority under Section 191 have been satisfied.

It is true that court-appointed receivers are not expressly named in Section 192, and that they are officers of the court

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[8] Illinois ex rel. *Gordon* v. *Campbell*, 329 U.S. 362 (1946); *United States* v. *Texas*, 314 U.S. 480, 483-84 (1941); *United States* v. *Emory*, 314 U.S. 423, 426 (1941); *Spokane County* v. *United States*, 279 U.S. 80, 85, 93 (1929); *United States* v. *Butterworth-Judson Corp.*, 269 U.S. 504, 513-14 (1926); *Stripe* v. *United States*, 269 U.S. 503 (1926); *Price* v. *United States*, 269 U.S. 492 (1926); *Davis* v. *Pullen*, 277 Fed. 650, 655 (1st Cir. 1922).

[9] Cf. *Want* v. *Commissioner*, 280 F. 2d 777, 783 (2d Cir. 1960). See Annotation, 41 A.L.R. 2d 446, 450 (1955).

[10] *Pennsylvania Cement Co.* v. *Bradley Contracting Co.*, 274 Fed. 1003, 1006 (S.D.N.Y. 1920). But see *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953); *United States* v. *Hicks*, 51 Am. Fed. Tax R. 1497 (S.D. Fla. 1956). The *Stephens* case has been criticized as "difficult to support." 9 Mertens, Federal Income Taxation § 54.12, a. 73. See 67 Harv. L. Rev. 1274 (1954).

and not primarily representatives of the parties. But it has been held that a trustee in bankruptcy,[11] a state official charged with liquidating a bank,[12] and an officer-director of a liquidating corporation[13] may be liable under Section 192 though none of these is within the classes of persons named. Moreover, a trustee in bankruptcy (like a court-appointed administrator, a class specifically named in Sec-[fol. 30] tion 192) is an officer of the court,[14] and neither a trustee in bankruptcy nor a state official acts primarily as agent for the parties.

The Court in *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953), predicated its holding that court-appointed receivers were excluded from liability under Section 192 in part upon the ground that appointment of a receiver to distribute an insolvent's assets does not give rise to priority under Section 191. We understand the law to be to the contrary, as we have noted. The Court in *Stephens* also suggested that executors, administrators, and assignees are personal representatives of a decedent or debtor and therefore the meaning of the words "or other person" in Section 192 should be similarly confined, to the exclusion of a receiver who is "an officer or arm of the court, * * * not a representative of the parties,"[15] particularly in view of the reference in that section to payment by the fiduciary of debts due from "the person or estate for whom or for which he acts." But the debts paid by a liquidating re-

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[11] *United States* v. *Kaplan*, 74 F. 2d 664, 665 (2d Cir. 1935); *In re Anderson*, 279 Fed. 526, 527 (2d Cir. 1922) (dictum). Cf. *Want* v. *Commissioner*, 280 F. 2d 777, 783 (2d Cir. 1960).

[12] *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483 (1926); *United States ex rel. Ray* v. *Porter*, 24 F. 2d 139, 143 (D. Idaho 1927).

[13] *United States* v. *Lutz*, 296 F. 2d 736 (5th Cir. 1961). See 34 Taxes 477 (1956).

[14] 2 Collier Bankruptcy 1737 (14th ed.). A fiduciary is not relieved of liability because distribution in disregard of the Government's priority has been approved by the court. Cases are collected at 41 A.L.R. 2d 462 (1955).

[15] 208 F. 2d at 107.

ceiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase "for whom, or for which he acts" should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191. In terms of the purpose of the two sections, the significant characteristic which persons in the classes named in Section 191 have in common is "not that they represent debtors rather than courts, but [fol. 31] rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations. Under the rationale of *Bramwell*, any "other person" who answers this description is included in Section 192, if the debtor is insolvent.

We therefore hold that appellee's status as a court-appointed receiver does not immunize him from personal liability if he would otherwise be subject to such liability under Section 192.[16]

Reversed.

[File endorsement omitted]

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[16] We assume without deciding that the circumstances of this case were such that debts due the United States acquired priority under Section 191 (*Illinois* v. *Campbell*, 329 U.S. 462, 368-69 (1946)); that question was not raised here or in the District Court.

[fol. 32]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA, Appellant,

v.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and National Surety Corp., a corporation of the State of New York.

Appeal from the United States District Court for the District of New Jersey.

Argued June 3, 1963

Before Biggs, Chief Judge, and McLaughlin and Ganey, Circuit Judges.

OPINION OF THE COURT—Filed September 13, 1963

By Biggs, *Chief Judge*.

This is an appeal from a judgment dismissing the complaint of the United States on the ground that the evidence fails to support the cause of action alleged.

The action was brought by the United States against the executrix of George S. King,[1] a distributing agent for the [fol. 33] Seeley Tube and Box Company, a bankrupt in a Chapter XI proceeding, and against National Surety Cor-

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[1] King died testate after the commencement of the suit at bar, and his executrix was substituted as a party defendant in his stead pursuant to an order of the court entered on June 15, 1959.

An action by the United States against a fiduciary under Rev. Stat. § 3467, 31 U.S.C.A. § 192 does not abate and survives against his executrix. See United States v. Dewey, 39 Fed. 251 (C.C. S.D. N.Y. 1889).

poration, the surety on King's bond. The complaint alleges that the United States has a debt entitled to priority pursuant to 11 U.S.C.A. § 104 and Rev. Stat. § 3466, 31 U.S.C.A. § 191,[2] against Seeley's assets, that King, as Seeley's distributing agent, paid Seeley's other creditors before attempting to satisfy the priority claim in favor of the United States, and that as a result the bankrupt's assets were depleted so as to prevent full payment to the United States of its claim. The complaint further alleges that King, or his surety to the extent of the bond, is personally liable to the United States for the unpaid portion of the claim under Rev. Stat. § 3467, 31 U.S.C.A. § 192.[4]

The stipulated facts, as found below by the court below are as follows: On October 1, 1946, Seeley filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 *et seq.* King, the president of the

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[2] Section 191 of 31 U.S.C.A. provides as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[3] Section 104 of 11 U.S.C.A. provides in pertinent part: "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (5) debts owing to any person, including the United States, who by the laws of the United States in [sic] entitled to prjority. . . ."

Section 192 of 31 U.S.C.A. provides as follows: "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

debtor corporation, was appointed distributing agent[4] by an order of the referee filed on March 22, 1947, and he filed [fol. 34] a bond in the amount of $10,000 underwritten by the defendant surety company. King's duties were to receive a fund of $160,193.68 deposited by Seeley, deposit the fund in an account subject to the control of the bankruptcy court and to distribute the fund by checks drawn by him and countersigned by the referee in accordance with orders of distribution to be made by the referee.

A hearing on an amended plan of arrangement was held on March 21, 1947. The plan did not contain any "written provisions" for payment of the claim of the United States. However, during the course of the hearing counsel for Seeley admitted that the United States might have a claim as a result of terminated executory contracts between Seeley and Picatinny Arsenal, an installation of the War Department at Dover, New Jersey. Seeley's counsel further stated that $94,000 would be available to pay the Government's claim that "there will be at all times $20,000 or more available to dispose of that claim, in cash." On April 14, 1947, the referee entered an order directing the United States to file its claim on or before May 9, 1947.

On that due date, May 9, 1947, the United States filed a preliminary contingent proof of its claim in the amount of $26,818.82, and alleged that it was a priority creditor. However, during the time between the hearing on March 21, 1947 and the date on which the Government filed its claim, May 9, 1947, King, in his capacity as distributing agent, had paid out all but $6,085.01 of the fund deposited with him[5] to other creditors of Seeley. Each check drawn

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[4] Section 737 of 11 U.S.C.A. provides in pertinent part: "[T]he judge or referee shall, after the acceptance of the arrangement— (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court. . . ."

[5] King deposited the fund received by him from Seeley with the West Side Trust Company of Newark, New Jersey, and had it credited to his account as distributing agent for Seeley. See King's final petition and report, filed May 3, 1956, attached to the complaint of the United States as exhibit "A".

by King for these other creditors had been issued pursuant to specific court orders and had been countersigned by the referee.

[fol. 35] On March 30, 1949, the United States amended its claim of May 9, 1947 to $34,125.93, the final allowed amount of the claim. Of the $6,085.01 remaining of the fund in the hands of King, $5,620.39 was paid to the United States and the balance to other creditors.

On December 8, 1953, the referee determined that the claim of the United States had been filed in time and that the amended plan of arrangement had been confirmed upon the condition as had been stated by Seeley's counsel, that there would be an adequate sum available to satisfy the claim of the United States. The United States District Court for the District of New Jersey reversed the decision of the referee. In re Seeley Tube & Box Co., 120 F. Supp. 269 (D.N.J. 1954). This court reversed the district court and held that "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was . . . in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." In the Matter of Seeley Tube & Box Co., 219 F.2d 389, 391 (3 Cir. 1955), *cert. denied*, 350 U.S. 821 (1955).

On August 2, 1956, the referee approved King's final report and accounting and discharged both King and the surety. The final amount outstanding on the claim in favor of the United States was $25,831.08 after allowance of proper deductions and credits.

On July 3, 1958, the United States commenced the suit at bar against King's executrix for the sum of $25,831.08, the balance outstanding on the claim, and against the surety for $10,000, the amount of its bond. The case was submitted to the district court below, sitting without a jury, upon the stipulated facts. The complaint was dismissed by an order entered on October 8, 1962. In its opinion[1] the court held that 31 U.S.C.A. § 192 did not apply to a distributing agent, and as King's executrix could not,

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[1] United States v. King, 208 F. Supp. 697 (D.N.J. 1962)

therefore, be liable, the surety must be exonerated as well. [fol. 36] It is the position of the United States on this appeal that King, as distributing agent, is within the class of persons on whom personal liability is imposed by 31 U.S.C.A. § 192 to the extent of a priority claim due the United States where such person exhausts or partially exhausts the debtor's fund by paying other creditors before the United States. The pertinent statute, 31 U.S.C.A. 192, is as follows: "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It appears therefore that the question for our determination is whether a distributing agent in a Chapter XI proceeding is an "executor, administrator, or assignee, or other person," within the meaning of the statute quoted.

Sections 191 and 192 of 31 U.S.C.A. must be interpreted *in pari materia*, as parts of a "common statutory scheme." United States v. Crocker, 313 F.2d 946, 947 (9 Cir. 1963). See United States v. Butterworth-Judson Corp., 269 U.S. 504, 513 (1926). See also United States v. Lutz, 295 F.2d 736, 742 (5 Cir. 1961): "The statutes [§§ 191 and 192] have an historical relation to the early efforts of the founding fathers to make this country a union and not a confederation of states. The precursor of Section 191 was enacted in 1797 to give the government a priority in the recovery of its debts from insolvent persons. When that section was reenacted in 1799 the forerunner of Section 192 was passed as a companion measure. This coincidence of enactment raises an inference that the two provisions should be read together as parts of a single legislative plan. The inference is confirmed by consideration of the operation and effect of Section 192. Construed in conjunction with Section 191, . . . the section promotes obedience to the require- [fol. 37] ment of Section 191 that government debts be given priority when a corporation is insolvent, and it pro-

tects the government's interest when that requirement is violated. It accomplishes this without overshooting the coverage of Section 191 and without burdening business operations except in cases of insolvency, when the government is in danger of being unable to collect its debts. It imposes the danger of personal liability on the corporate officers only at times when because of the shortage in funds they should be alert to the necessity for paying debts according to their priorities."

Taken together, then, Sections 191 and 192 impose two requirements both of which must be met if the United States is to prevail in an action such as that at bar. First, the debt owing to the United States must be one afforded priority under Section 191. Secondly, the fiduciary sought to be held personally liable for the debt under Section 192 must be either an "executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate. . . ." See United States v. Crocker, *supra* at 947-948. See also Bramwell v. United States Fid. & Guar. Co., 269 U.S. 483, 490 (1926).

That the debt owing from Seeley to the United States is one afforded priority under Section 191 is an issue that requires no extended discussion for the debt is clearly one within the list enumerated in that section. The fact that the United States did not formally file its claim or proof of claim at the hearing on the amended plan of arrangement does not alter the debt's priority status, nor can this factor alter the fiduciary's liability under Section 192. United States v. Kaplan, 74 F.2d 664 (2 Cir. 1935).

The second of these two requirements, that is, that the fiduciary sought to be held personally liable for the debt [fol. 38] be one within the net of liability cast by Section 192, does not admit of a short answer. We have been unable to find any direct authority on this point where the fiduciary involved is, as in the case at bar, a distributing agent.[7]

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[7] The fiduciary must, in addition, have notice of the claim in favor of the United States before making the distribution to the other creditors. Want v. Commissioner, 280 F.2d 777 (2 Cir. 1960).

In two cases involving a somewhat analogous fiduciary, a receiver, conflicting results were reached by two courts of appeals.

In United States v. Stephens, 208 F.2d 105 (5 Cir. 1953), a receiver appointed by a state court for an insolvent corporation had exhausted the debtor's fund by paying other creditors in advance of satisfying priority claims due to the United States. The United States commenced suit under Section 192 to hold the receiver personally liable for the debt, but the district court dismissed the complaint on the ground that Section 192 is not applicable to court-appointed receivers. The dismissal of the complaint was affirmed on appeal. The court of appeals pointed out that Section 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by title, and construed the additional, albeit somewhat vague, designation "or other person" as being "limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*'" United States v. Stephens, *supra*, at 108. (Emphasis in original). The court, asserting that a receiver is an officer or arm of a court acting for and under a court rather than for the debtor, concluded that a receiver is not within the purview of Section 192.*

In United States v. Crocker, *supra*, the Court of Appeals for the Ninth Circuit arrived at a different result than that reached by the Fifth Circuit in the Stephens case, *supra*, on similar facts. In Crocker, a receiver appointed by a state court took possession of the debtor's assets and distributed the proceeds of the sale of the assets to other [fol. 39] creditors although the receiver knew of the existence of a priority claim in favor of the United States. The complaint filed by the United States against the receiver, alleging personal liability under Section 192, was dismissed

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* The Stephens decision is criticized in 67 Harv. L. Rev. 1274 (1954).

by the district court.[9] The Court of Appeals reversed. In a thorough and comprehensive opinion by Judge Browning, the court held that Sections 191 and 192, read together, impose personal liability upon the person to whom control of a debtor's assets has passed after a divestment of the kind specified in Section 191 where such person has knowingly failed to pay a priority debt owing from the debtor to the United States. The court pointed out that the scope of Section 192 is not limited to those classes of fiduciaries specifically enumerated in it, and cited several cases in which fiduciaries outside the statutory enumeration were held personally liable, as, for example, a trustee in bankruptcy.[10] The court in Crocker did not accept the position taken in Stephens, *supra*, that Section 192 must be construed to encompass only those fiduciaries standing in a personal relationship to the debtor as his or its representative and that, therefore, a receiver, as a representative of the court rather than the debtor, could not be within the scope of the statute. Instead, the court in Crocker asserted: "[T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom or for which he acts' should be read as a general acknowledgement of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191. In terms of the purpose of the two sections, the significant [fol. 40] characteristic which persons in the classes named in Section 191 [*sic* § 192] have in common is not that they represent debtors rather than courts, but rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations. . . . [A]ny 'other person' who answers this description is in

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[9] It should be noted that the district court in the case at bar cited the decision of the district court in Crocker, 194 F. Supp. 860 (D. Nev. 1961), in its opinion. The subsequent reversal of that decision by the Ninth Circuit, filed February 15, 1963, was, of course, not available to the court below at the time its opinion was prepared.

[10] United States v. Kaplan, 74 F.2d 664 (2 Cir. 1935).

cluded in Section 192, if the debtor is insolvent." United States v. Crocker, *supra* at 949.

The decisions in Stevens and Crocker, *supra*, are helpful but they cannot be deemed to be determinative of the issue presented by this appeal. The appellees here lay emphasis on the fact that in Crocker the receiver was empowered to operate the debtor's business and did so for about two years. The business was then sold by him and he distributed the proceeds of the sale to creditors other than the United States, albeit he knew of the priority claim asserted by the United States. According to the allegations of the complaint, which had to be taken as true, neither the sale of the assets nor the distribution was authorized or approved by the state court. See 194 F.Supp. 860, 861 (D. Nev. 1961). There can be no question that the receiver in Crocker had actual and effective control over the assets of the debtor. In fact, he exercised more control than that ordinarily permitted by law. He had the ability to pay out and did in fact pay out the proceeds to creditors.

The appellees also emphasize the decision in Brainwell v. United States Fid. & Guar. Co., *supra* at 490, in which the Supreme Court construed Sections 191 and 192 to impose personal liability for a priority debt due the United States "when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent. . . .". In Brainwell the monies belonging to an Indian tribe had been placed in an Oregon bank and the bank had been placed in the exclusive position and control of the State Superintendent of Banks to be administered according to the Oregon law under which the State Superintend- [fol. 41] ent of Banks performed the functions of assignee, receiver or trustee for the liquidation of the debts of the insolvent bank. Here, of course, the measure of control in the assignee was indeed large for the liquidator, apparently, could make distribution without reference to a court order. The appellees point out that in United States v. Crocker, *supra* at 949, the Court of Appeals for the Ninth Circuit stated that "the significant characteristic which persons in the classes named in Section 191 [*sic* 192] have in common is . . . that they are given possession and control

of assets of debtors and are charged with the payment of debtors' obligations." The appellees assert that the distributing agent was nothing more than an "amanuensis", "A person whose employment is to write from dictation, or to copy what another has written; a secretary." See Webster's International Dictionary. It is the position of the appellees that once the distribution had been established by the orders of the bankruptcy court that precise distribution became immutable, and the distributing agent, King, was bound thereon and was compelled to make distribution according to the distribution sheets or stand in contempt of the bankruptcy court. But the duties of the distributing agent in performing the final function of distribution of a debtor's estate to creditors are not different in any substantial way from those imposed on a receiver in equity, a receiver in bankruptcy, or a trustee in bankruptcy acting under the order of the court which appointed him. Changes in distribution can be effected upon timely application to the court. Negligence is apparent in the situation at bar. Moreover, in the case at bar it should be noted that King was not only the distributing agent but that prior to the Chapter XI proceeding, King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. Indeed, as we have pointed out at an earlier point in this opinion, Seeley's counsel stated that there would be available at all times $20,000 or more to dispose of the [fol. 42] claim of the United States "in cash". Putting it plainly, we do not think that the equities here weigh very heavily in favor of King.

We point out also that Section 192 is a very old statute. It was derived from the Act of March 2, 1799, 1 Stat. 676, and was designed for one purpose only, to aid in the collection of sums due the United States. It will be observed that the statute is exact in its terms and provides that "Every executor, administrator or assignee or other person . . . who pays . . . any debt due by the . . . estate for . . . which he acts before he . . . pays the debts due the United States from such . . . estate shall become answerable in his own person and estate", for the debt due the United States. There is nothing in the statute as to the "control" of the fund by the disbursing individual. The

critical phrase is a very uncomplex one; it is simply he "who pays". It is a statute intended by Congress as a final backstop for the protection of the federal fisc. We conclude that King is personally liable. See Field v. United States, 34 U.S. (9 Pet.) 182 (1834); United States v. Barnes, 31 Fed. 705, 707 (C.C.S.D. N.Y. 1887). See also United States v. Weisburne, 48 F. Supp. 393, 397 (E.D. Pa. 1943).

In reaching this conclusion we are not unmindful that the appellees have asserted a doctrine of estoppel against the United States. In this connection we need say only that estoppel is not available as a defense against the United States.

The judgment of the court below will be reversed. The case will be remanded with the direction to enter judgment in favor of the United States in accordance with this opinion.

[fol. 43]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA, Appellant

vs.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and NATIONAL SURETY CORP., a corporation of the State of New York

---

On appeal from the United States District for the ..... District of New Jersey.

Present: Biggs, Chief Judge, and McLaughlin and Ganey, Circuit Judges.

JUDGMENT—September 13, 1963

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 8, 1962 in this case be, and the same is hereby reversed and the cause remanded with the direction to enter judgment in favor of the United States in accordance with the opinion of this Court.

September 13, 1963.

[File endorsement omitted]

[fol. 44]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA, Appellant

vs.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and NATIONAL SURETY CORP., a corporation of the State of New York

---

ORDER STAYING ISSUANCE OF MANDATE—
September 25 1963

Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until October 28, 1963.

Biggs, Chief Judge.

[File endorsement omitted]

[fol. 45] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 654—October Term, 1963

ELIZABETH SIMONSON KING, ETC., et al., Petitioners,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—January 13, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
DEC 2 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]16

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, DECEASED, and NATIONAL SURETY CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, Deceased, and NATIONAL SURETY CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, deceased, and NATIONAL SURETY CORP., by their attorneys, respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 13, 1963.

PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Court of Appeals of September 13, 1963, is reported at 322 F. 2d 317 and also is appended hereto (P. App. p. 16). On the basis of that opinion the United States Court of Appeals for the Third Circuit entered a judgment reversing the judgment of the United States District Court for the District of New Jersey in favor of the defendants and remanding the case with a direction to enter judgment in favor of the United States of America (P. App. p. 28). The District Court opinion is reported at 208 F. Supp. 697 and also is set forth in appellant's brief (App. 11a).

The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1). The judgment of the United States Court of Appeals for the Third Circuit was entered on September 13, 1963. On October 25, 1963 The United States Court of Appeals For The Third Circuit ordered that issuance of the mandate in this case be stayed until December 13, 1963.

Question Presented.

1. May a distributing agent or his surety be held liable under the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191, and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, for the payment of a claim of the United States of America where the said agent has disbursed all of the funds coming into his possession pursuant to order of the court?

The Statutes Involved.

Section 64, Chapter VII, of the Bankruptcy Act, 11 U. S. C. sec. 104, provides in pertinent part:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States of America, who by the laws of the United States of America is entitled to priority, * * * "

Section 337, Chapter XI, of the Bankruptcy Act, 11 U. S. C. sec. 737, provides in pertinent part:

> "*Same; conduct and business after acceptance of arrangement.*
>
> At such meeting, or in any adjournment therof, the judge or referee shall, after the acceptance of the arrangement—
>
> (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation not in excess of the compensation allowable to a receiver under this title."

* * * * * *

Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 provide:

> "SECTION 191. *Priority Established.*
>
> Whenever any person indebted to the United States is insolvent, or whenever the estate of any

deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

"SECTION 192. *Liability of Fiduciaries.*

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Statement of the Case.

This suit was brought by the United States of America against the distributing agent in bankruptcy of a corporation, and his surety, to subject the agent to personal liability pursuant to Rev. Stat. sec. 3466, 31 U. S. C. sec. 192 for his alleged failure to honor the government's debt priority under Rev. Stat. sec. 3467, 31 U. S. C. sec. 191. The United States District Court for the District of New Jersey had jurisdiction of the subject matter under 28 U. S. C. sec. 1345.

1. The Background of the Case.

On October 1, 1946, the Seeley Tube and Box Company, Inc., a New Jersey corporation, filed a petition in the Dis-

trict Court for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. sec. 701, *et seq.* (App. 12a). With the petition, the debtor filed a statement of executory contracts, including a number of government contracts with the Picatinny Arsenal (App. 12a-13a). A few days later, the United States gave notice to the debtor of its intention to terminate two of these contracts because of the debtor's default in performance, and, on November 18 and 19, 1946, they were terminated (App. 13a). The Government reserved its right to hold the debtor liable for any damages that might result from the re-letting of the contracts (App. 13a).

On February 28, 1947, the debtor filed an amended plan of arrangement which provided for the payment in full of all unsecured debts (App. 13a). On March 17, a referee in bankruptcy appointed George Stewart King to be distributing agent, pursuant to 11 U. S. C. sec. 737(1), *supra*, at p. 3, his duties thereunder being to distribute a fund of $160,193.68 to be deposited by the debtor (App. 12a; 10a). The National Surety Corporation gave bond in the amount of $10,000.00 for the faithful performance by King of his duties (App. 12a). On March 21, 1952, the bond was reduced to $4,000.00 by court order (App. 12a).

A hearing on the confirmation of the amended plan of arrangement was held by the referee on March 21, 1947. The plan contained no written provision as to the Government's claim, which was not yet liquidated (App 13a). However, during the hearing, the counsel for the debtor remarked that there might be an outstanding claim, amounting to perhaps $20,000.00, with respect to the Picatinny Arsenal contracts (App. 13a). In discussion with the referee, he asserted that "the debtor company will deposit any sum of money that is represented by any claim that

the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it" and, further, that "we have $94,000.00 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000.00 or more available to dispose of that claim, in cash" (App. 13a-14a). The referee then entered an order confirming the plan of arrangement and directing King to carry it out as follows (App. 13a; 10a-11a):

> "2. G. Stewart King, as distributing agent of debtor be, and he is hereby authorized, directed and empowered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court;"

On April 14, 1947, an order was entered directing the United States of America to file its claim on or before May 9, 1947, (App. 15a). On May 9, 1947, the United States of America filed its preliminary contingent proof of claim in the amount of $26,818.82. The aforesaid claim alleged that the United States of America was a priority creditor (App. 15a).

Between March 21, 1947, the date of hearing, and May 9, 1947, the distributing agent had, in accordance with his orders received on March 21, 1947, and in accordance with orders and arrangement sheets also received by him on March 21, 1947, signed and sent to the referee for countersigning and transmittal, checks disbursing all but $6,085.01 of the money deposited with him (App. 15a). Each check had been issued pursuant to a court order and was countersigned by the referee in bankruptcy (App. 15a). The

$6,085.01 was subsequently distributed as follows (App. 15a):

United States of America	$3,620.39
Creditors having a priority to United States of America	1,057.55
Creditors not having a priority	1,407.07
	$6,085.01

On March 30, 1949, the Government amended its claim to $34,125.03 (App. 15a). The referee ruled, on December 8, 1953, that the claim of the Government had been timely filed for purposes of the Bankruptcy Act, a ruling which was reversed by the District Court on review, *In re Seeley Tube and Box Company*, 120 F. Supp. 269 (D. N. J. 1954) (App. 15a). On appeal, the United States Court of Appeals for the Third Circuit reinstated the referee's decision holding that:

> "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefor in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." *In re Seeley Tube and Box Company*, 219 F. 2d 389, at 391 (3d Cir. 1955), *cert. denied*, 350 U. S. 821, (1955).

On August 2, 1956, the bankruptcy court entered an order approving King's final report and account, discharging him of his trust, and also cancelling the surety's bond (App. 16a).

2. Proceedings Below

The instant suit was brought by the United States against King and his surety company on the ground that

King was subjected to personal liability by Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, *supra*, p. 4, because he had failed to make payment to the Government as a priority creditor, as required by Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 *supra*, pgs. 3 & 4. On King's death, his widow, as executrix of his estate, was substituted as party defendant (App. 11a).

The District Court dismissed the Government's complaint, holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U. S. C. sec. 192, *United States* v. *King* 208 F. Supp. 697 (D. N. J., 1962). The Court of Appeals reversed this decision by an opinion and order filed September 13, 1963 (P. App.).

Reasons Urged for Granting Writ.

1. The Court of Appeals in extending the scope of Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, to hold liable for the Government's priority claims a distributing agent who followed explicitly the orders of the court, has ruled contrary to the case of *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953), where a receiver who followed the orders of the court was held not liable for payments made ahead of the Government's priority claims.

2. The Court of Appeals was in error in interpreting the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, to hold liable for the Government's priority claims a mere agent, appointed by the Court to distribute pursuant to the Order of the Court, where such agent followed his orders precisely and payments were made ahead of the Government's priority claims.

I.

Conflict between the 5th Circuit and the 3rd Circuit.

The Court of Appeals should follow the decision of *United States* v. *Stephens* 208 F. 2d 105 (5th Cir. 1953).

In *United States* v. *Stephens, Ibid*, a receiver appointed by a state court for an insolvent corporation followed schedules and orders of the court and as a result the debtor's fund had been exhausted by paying other creditors in advance of satisfying priority claims due to the United States. The United States commenced suit under Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 to hold the receiver personally liable for the debt, but the District Court dismissed the complaint on the ground that sec. 192 is not applicable to court appointed receivers, *United States* v. *Stephens* (Not reported). The dismissal of the complaint was affirmed on appeal, *United States* v. *Stephens,* 208 F. 2d 103 (5th Cir. 1953). The Court of Appeals pointed out that sec. 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by title and construed the words "or other person" as being "limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying person as one who pays in whole or in part any *debt due by the person or estate for whom or for which he acts.*" *United States* v. *Stephens, Id* at p. 108. (Emphasis in original). The court asserted that the defendant as a receiver was an officer or arm of the court acting for the court rather than for the debtor. It concluded that the defendant was not within the purview of sec. 192, and that the suit was properly dismissed.

There are no other cases which have come to counsel's attention in which a receiver or distributing agent who followed explicitly the orders of the court has been held individually liable under sec. 192. There is one case, the case of *United States* v. *Crocker*, 313 F. 2d 946 (9th Cir. 1963), where a receiver acting without court authorization or approval was held liable. The fact that the receiver in *Crocker* was acting without the approval of the court is specifically referred to in the lower court's opinion, *United States* v. *Crocker*, 194 F. Supp. 860, at 861 (D. Nev. 1961). Thus the holding in *United States* v. *Crocker* is really no more than a case in line with the holding in *In Re J. B. Pollak Co., Inc.*, 86 F. 2d. 99 (2d Cir. 1936), where a distributing agent was held liable to creditors when payments were made without proper order, resulting in a depletion of the fund so that creditors claims could not be satisfied. The court in both those cases properly held the individual liable because he was no longer acting as an agent of the court but was on his own initiative taking on a responsibility and acting in the same manner as might an "executor, administrator or assignee." He was not acting strictly as an arm of the court.

In *United States* v. *Sachs*. 217 F. Supp. 545 (D. Md., 1963) a receiver was also held liable for disregarding the right of priority of the government in distributing the assets of an insolvent corporation. The opinion does not state whether the court ordered this distribution, whether there was a disregard of a contrary order, or whether no order was made. It would seem probable from the court's language and from the fact that a proof of claim had been filed by the government prior to any distribution that the distribution was either made without an order of court or in contravention of such order.

II.

Interpretation of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192.

A distributing agent appointed pursuant to sec. 337, Chapter XI of the Bankruptcy Act, 11 U. S. C. 737, *supra*, p. 3, who follows the orders of the court in the distribution of a debtor's assets should not be subjected to liability under the above statutes where payments were made ahead of a priority claim of the government.

The distributing agent herein was appointed by the court concurrently with the deposit by the debtor corporation of a sum sufficient to consummate its plan of arrangement with unsecured creditors. Since the debtor had remained in possession, some functionary was necessary to act as the arm of the court in the preparation of the necessary dividend checks as directed by the court. The defendant, King, was not directed to inquire into the affairs of the debtor to determine what priority claims existed nor was any provision made to compensate him for so doing. He was appointed to act as an arm of the court in carrying out the provisions of 11 U. S. C. sec. 737. He was ordered to perform the following duty (App. 10a):

> "* * * the said distributing agent being hereby directed on receipt of such consideration to deposit said funds in an account to be opened in any qualified bankruptcy depository in this district, subject to the control and order of this Court."

Thereafter, upon confirmation, he was further ordered as follows (App. 10a-11a):

> "G. Stewart King, as distributing agent of debtor be and he is hereby authorized, directed and empow-

> ered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court."

Subsequently, orders for distribution were made by the court giving the name of each person to whom distribution was to be made together with the amount of such distribution.

Thus the distributing agent's function was purely a ministerial one. His sole discretion was in the selection of a "qualified bankruptcy depository in this district." It cannot be denied that in the instant case the defendant, King, faithfully carried out the order of the court. It is a matter of record that the defendant accounted to the court and was discharged of his trust (App. 16a). In fact, the charge directed at the defendant, King, is that he did carry out the orders of the court and that his obedience to these orders renders him liable to the United States of America.

The law is clear that a ministerial officer may not act in any manner other than in compliance with the orders of the court, *Stearns, Suretyship*, sec. 9.27, p. 341 (5th Ed. 1951). The rule applies to a special commissioner:

> "And the failure of a special commissioner to pay out funds as directed by the Circuit Court may render him liable on his bond." 9 *Appleman, Insurance Law and Practice* sec. 5445, p. 297 (1943), citing *State* v. *United States Fidelity & Guaranty Co.*, 81 W. Va. 184, 94 S. E. 123 (Sup. Ct. W. Va. 1917).

and to a receiver:

> "Since a receiver is considered to be an officer of the court, his obedience to court orders has been

> held to be enforceable by contempt proceedings, or by an action on his bond, or both." 9 ***Appleman, supra***, at sec. 5479, p. 376.

The same rule applies to a distributing agent:

> "In making distribution such agent [distributing] was entitled to rely upon copies of the dividend sheets annexed to the duly certified copy of the Order of Confirmation furnished to him by the Referee in charge, but if he abused his powers or was faithless to his trust, he could become personally liable to those entitled to share in the funds." 9 ***Remington, Bankruptcy Law***, sec. 3598, p. 238 citing ***In Re Empire Shoe Corporation***, 16 F. Supp. 713, (D. N. Y. 1936).

In the case of *In Re Empire Shoe Corporation*, *Ibid*, the court held that the depository acting as distributing agent was absolutely entitled to rely on the certified copy of schedules furnished by the referee and that a priority creditor who was overlooked by those schedules should not be allowed to recover against the distributing agent. The court said at page 715, "It would be unfair to hold it [the distributing agent] financially responsible for mistakes of others."

In the case at bar the court below has placed emphasis on the fact that Mr. King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. No negligence of misfeasance of any kind on King's part was ever proven or attempted to be proven by the Government, although it had every opportunity to do so. No effort has ever been made by the Government to establish that Mr. Freeman, counsel for the debtor corporation, was not utterly truthful when he made his statement regarding the corporation's

ability to pay (App. 13a-14a) and was not acting in perfect good faith. The Government did not seek to have Mr. Freeman brought into court to establish the guilt or negligence of Mr. King, although it could easily have done so.

Mr. King was acting under strict and binding orders which gave him no freedom of action and absolutely no discretion except perhaps the choice of which bank to use to deposit money in. His title, distributing agent, in itself implies a complete lack of power to act on his own. He was in no sense a distributing or paying person such as is implied in sec. 192 by the words "any other person." The person who distributed or paid in the case at bar was the court itself. Mr. King should no more be charged with responsibility here for the Government's loss than should the private in the Army for the loss of a battle when he has done precisely what he was told.

Conclusion.

Because the decision in the court below is directly contrary to the holding in *United States v. Stephens*, 208 F. 2d 105 (5th Cir. 1953), and because the court below has erroneously interpreted the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191, and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 to hold liable for a priority claim of the Govern-

ment a mere distributing agent when such agent has followed strictly the orders of the court, the writ should issue.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA,

Appellant,

v.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and National Surety Corp., a corporation of the State of New York.

Appeal from the United States District Court for the District of New Jersey

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Argued June 3, 1963

Before BIGGS, Chief Judge, and MCLAUGHLIN and GANEY, Circuit Judges.

Opinion of the Court.

(Filed Sept. 13, 1963)

By BIGGS, Chief Judge.

This is an appeal from a judgment dismissing the complaint of the United States on the ground that the evidence fails to support the cause of action alleged.

The action was brought by the United States against the executrix of George S. King,[1] a distributing agent for the Seeley Tube and Box Company, a bankrupt in a Chapter XI proceeding, and against National Surety Corporation, the surety on King's bond. The complaint alleges that the United States has a debt entitled to priority pursuant to 11 U.S.C.A. § 104 and Rev. Stat. § 3466, 31 U.S.C.A. § 191[2], against Seeley's assets, that King, as Seeley's distributing agent, paid Seely's other creditors before attempting to satisfy the priority claim in favor of the United States, and that as a result the bankrupt's assets were depleted so as to prevent full payment to the United States of its claim. The complaint further alleges that King, or his surety to the extent of the bond, is personally liable to the United States for the unpaid portion of the claim under Rev. Stat. § 3467, 31 U.S.C.A. § 192[3].

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[1] King died testate after the commencement of the suit at bar, and his executrix was substituted as a party defendant in his stead pursuant to an order of the court entered on June 15, 1959.

An action by the United States against a fiduciary under Rev. Stat. § 3467, 31 U.S.C.A. § 192 does not abate and survives against his executrix. See United States v. Dewey, 39 Fed. 251 (C.C.S.D. N. Y. 1889).

[2] Section 191 of 31 U.S.C.A. provides as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[3] Section 104 of 11 U.S.C.A. provides in pertinent part: "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (5) debts owing to any person, including the United States, who by the laws of the United States is [sic] entitled to priority. . . ."

Section 192 of 31 U.S.C.A. provides as follows: "Every executor, administrator, or assignee, or other person, who pays, in

The stipulated facts, as found below by the court below are as follows: On October 1, 1946, Seeley filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 *et seq.* King, the president of the debtor corporation, was appointed distributing agent[4] by an order of the referee filed on March 22, 1947, and he filed a bond in the amount of $10,000 underwritten by the defendant surety company. King's duties were to receive a fund of $160,193.68 deposited by Seeley, deposit the fund in an account subject to the control of the bankruptcy court, and to distribute the fund by checks drawn by him and countersigned by the referee in accordance with orders of distribution to be made by the referee.

A hearing on an amended plan of arrangement was held on March 21, 1947. The plan did not contain any "written provisions" for payment of the claim of the United States. However, during the course of the hearing counsel for Seeley admitted that the United States might have a claim as a result of terminated executory contracts between Seeley and Picatinny Arsenal, an installation of the War Department at Dover, New Jersey. Seeley's counsel further stated that $94,000 would be available to pay the Government's claim and that "there will be at all times $20,000 or more available to dispose of that claim, in cash." On April 14, 1947, the referee entered an order directing the United States to file its claim on or before May 9, 1947.

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whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

[4] Section 737 of 11 U.S.C.A. provides in pertinent part: "[T]he judge or referee shall, after the acceptance of the arrangement—(1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court. . . ."

On that due date, May 9, 1947, the United States filed a preliminary contingent proof of its claim in the amount of $26,818.82 and alleged that it was a priority creditor. However, during the time between the hearing on March 21, 1947 and the date on which the Government filed its claim, May 9, 1947, King, in his capacity as distributing agent, had paid out all but $6,085.01 of the fund deposited with him[5] to other creditors of Seeley. Each check drawn by King for these other creditors had been issued pursuant to specific court orders and had been countersigned by the referee.

On March 30, 1949, the United States amended its claim of May 9, 1947 to $34,125.03, the final allowed amount of the claim. Of the $6,085.01 remaining of the fund in the hands of King, $3,620.39 was paid to the United States and the balance to other creditors.

On December 8, 1953, the referee determined that the claim of the United States had been filed in time and that the amended plan of arrangement had been confirmed upon the condition as had been stated by Seeley's counsel, that there would be an adequate sum available to satisfy the claim of the United States. The United States District Court for the District of New Jersey reversed the decision of the referee. In re Seely Tube & Box Co., 120 F. Supp. 269 (D. N. J. 1954). This court reversed the district court and held that "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was . . . in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." In the Matter of Seeley Tube & Box Co., 219 F. 2d 389, 391 (3 Cir. 1955), *cert. denied*, 350 U.S. 821 (1955).

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[5] King deposited the fund received by him from Seeley with the West Side Trust Company of Newark, New Jersey, and had it credited to his account as distributing agent for Seeley. See King's final petition and report, filed May 3, 1956, attached to the complaint of the United States as exhibit "A".

On August 2, 1956, the referee approved King's final report and accounting and discharged both King and the surety. The final amount outstanding on the claim in favor of the United States was $25,831.08 after allowance of proper deductions and credits.

On July 3, 1958, the United States commenced the suit at bar against King's executrix for the sum of $25,831.08, the balance outstanding on the claim, and against the surety for $10,000, the amount of its bond. The case was submitted to the district court below, sitting without a jury, upon the stipulated facts. The complaint was dismissed by an order entered on October 8, 1962. In its opinion[6] the court held that 31 U.S.C.A. § 192 did not apply to a distributing agent, and as King's executrix could not, therefore, be liable, the surety must be exonerated as well.

It is the position of the United States on this appeal that King, as distributing agent, is within the class of persons on whom personal liability is imposed by 31 U.S.C.A. § 192 to the extent of a priority claim due the United States where such person exhausts or partially exhausts the debtor's fund by paying other creditors before the United States. The pertinent statute, 31 U.S.C.A. § 192, is as follows: "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It appears therefore that the question for our determination is whether a distributing agent in a Chapter XI proceeding is an "executor, administrator, or assignee, or other person," within the meaning of the statute quoted.

Sections 191 and 192 of 31 U.S.C.A. must be interpreted *in pari materia*, as parts of a "common statutory

[6] United States v. King, 208 F. Supp. 697 (D.N.J. 1962).

scheme." United States *v.* Crocker, 313 F. 2d 946, 947 (9 Cir. 1963). See United States *v.* Butterworth-Judson Corp. 269 U. S. 504, 513 (1926). See also United States *v.* Lutz, 295 F. 2d 736, 742 (5 Cir. 1961): "The statutes [§§ 191 and 192] have an historical relation to the early efforts of the founding fathers to make this country a union and not a confederation of states. The precursor of Section 191 was enacted in 1797 to give the government a priority in the recovery of its debts from insolvent persons. When that section was reenacted in 1799 the forerunner of Section 192 was passed as a companion measure. This coincidence of enactment raises an inference that the two provisions should be read together as parts of a single legislative plan. The inference is confirmed by consideration of the operation and effect of Section 192. Construed in conjunction with Section 191, . . . the section promotes obedience to the requirement of Section 191 that government debts be given priority when a corporation is insolvent, and it protects the government's interest when that requirement is violated. It accomplishes this without overshooting the coverage of Section 191 and without burdening business operations except in cases of insolvency, when the government is in danger of being unable to collect its debts. It imposes the danger of personal liability on the corporate officers only at times when because of the shortage in funds they should be alert to the necessity for paying debts according to their priorities."

Taken together, then, Sections 191 and 192 impose two requirements both of which must be met if the United States is to prevail in an action such as that at bar. First, the debt owing to the United States must be one afforded priority under Section 191. Secondly, the fiduciary sought to be held personally liable for the debt under Section 192 must be either an "executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United

States from such person or estate. . . ." See United States *v.* Crocker, *supra* at 947-948. See also Bramwell *v.* United States Fid. & Guar. Co., 269 U. S. 483, 490 (1926).[7]

That the debt owing from Seeley to the United States is one afforded priority under Section 191 is an issue that requires no extended discussion for the debt is clearly one within the list enumerated in that section. The fact that the United States did not formally file its claim or proof of claim at the hearing on the amended plan of arrangement does not alter the debt's priority status, nor can this factor alter the fiduciary's liability under Section 192. United States *v.* Kaplan, 74 F. 2d 664 (2 Cir. 1935).

The second of these two requirements, that is, that the fiduciary sought to be held personally liable for the debt be one within the net of liability cast by Section 192, does not admit of a short answer. We have been unable to find any direct authority on this point where the fiduciary involved is, as in the case at bar, a distributing agent. In two cases involving a somewhat analogous fiduciary, a receiver, conflicting results were reached by two courts of appeals.

In United States *v.* Stephens, 208 F. 2d 105 (5 Cir. 1953), a receiver appointed by a state court for an insolvent corporation had exhausted the debtor's fund by paying other creditors in advance of satisfying priority claims due to the United States. The United States commenced suit under Section 192 to hold the receiver personally liable for the debt, but the district court dismissed the complaint on the ground that Section 192 is not applicable to court-appointed receivers. The dismissal of the complaint was affirmed on appeal. The court of appeals pointed out that Section 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by

[7] The fiduciary must, in addition, have notice of the claim in favor of the United States before making the distribution to the other creditors. Want v. Commissioner, 280 F. 2d 777 (2 Cir. 1960).

title, and construed the additional, albeit somewhat vague, designation "or other person" as being "limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*'" United States *v.* Stephens, *supra* at 108. (Emphasis in original). The court, asserting that a receiver is an officer or arm of a court acting for and under a court rather than for the debtor, concluded that a receiver is not within the purview of Section 192.[8]

In United States *v.* Crocker, *supra*, the Court of Appeals for the Ninth Circuit arrived at a different result than that reached by the Fifth Circuit in the Stephens case, *supra*, on similar facts. In Crocker, a receiver appointed by a state court took possession of the debtor's assets and distributed the proceeds of the sale of the assets to other creditors although the receiver knew of the existence of a priority claim in favor of the United States. The complaint filed by the United States against the receiver, alleging personal liability under Section 192, was dismissed by the district court.[9] The Court of Appeals reversed. In a thorough and comprehensive opinion by Judge Browning, the court held that Sections 191 and 192, read together, impose personal liability upon the person to whom control of a debtor's assets has passed after a divestment of the kind specified in Section 191 where such person has knowingly failed to pay a priority debt owing from the debtor to the United States. The court pointed out that the scope of Section 192 is not

[8] The Stephens decision is criticized in 67 Harv. L. Rev. 1274 (1954).

[9] It should be noted that the district court in the case at bar cited the decision of the district court in Crocker, 194 F. Supp. 860 (D. Nev. 1961), in its opinion. The subsequent reversal of that decision by the Ninth Circuit, filed February 15, 1963, was, of course, not available to the court below at the time its opinion was prepared.

limited to those classes of fiduciaries specifically enumerated in it, and cited several cases in which fiduciaries outside the statutory enumeration were held personally liable, as, for example, a trustee in bankruptcy.[10] The court in Crocker did not accept the position taken in Stephens, *supra,* that Section 192 must be construed to encompass only those fiduciaries standing in a personal relationship to the debtor as his or its representative and that, therefore, a receiver, as a representative of the court rather than the debtor, could not be within the scope of the statute. Instead, the court in Crocker asserted: "[T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom or for which he acts' should be read as a general acknowledgement of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191. In terms of the purpose of the two sections, the significant characteristic which persons in the classes named in Section 191 [*sic* § 192] have in common is not that they represent debtors rather than courts, but rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations . . . [A]ny 'other person' who answers this description is included in Section 192, if the debtor is insolvent." United States *v.* Crocker, *supra* at 949.

The decisions in Stevens and Crocker, *supra,* are helpful but they cannot be deemed to be determinative of the issue presented by this appeal. The appellees here lay emphasis on the fact that in Crocker the receiver was empowered to operate the debtor's business and did so for about two years. The business was then sold by him and he distributed the proceeds of the sale to creditors other than the United States, albeit he knew of the priority claim

[10] United States v. Kaplan, 74 F. 2d 664 (2 Cir. 1935).

asserted by the United States. According to the allegations of the complaint, which had to be taken as true, neither the sale of the assets nor the distribution was authorized or approved by the state court. See 194 F. Supp. 860, 861 (D. Nev. 1961). There can be no question that the receiver in Crocker had actual and effective control over the assets of the debtor. In fact, he exercised more control than that ordinarily permitted by law. He had the ability to pay out and did in fact pay out the proceeds to creditors.

The appellees also emphasize the decision in Bramwell *v.* United States Fid. & Guar. Co., *supra* at 490, in which the Supreme Court construed Sections 191 and 192 to impose personal liability for a priority debt due the United States "when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent. . . ." In Bramwell the monies belonging to an Indian tribe had been placed in an Oregon bank and the bank had been placed in the exclusive position and control of the State Superintendent of Banks to be administered according to the Oregon law under which the State Superintendent of Banks performed the functions of assignee, receiver or trustee for the liquidation of the debts of the insolvent bank. Here, of course, the measure of control in the assignee was indeed large for the liquidator, apparently, could make distribution without reference to a court order. The appellees point out that in United States *v.* Crocker, *supra* at 949, the Court of Appeals for the Ninth Circuit stated that "the significant characteristic which persons in the classes named in Section 191 [*sic* § 192] have in common is . . . that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations." The appellees assert that the distributing agent was nothing more than an "amanuensis", "A person whose employment is to write from dictation, or to copy what another has written; a secretary." See Webster's International Dictionary.

It is the position of the appellees that once the distribution had been established by the orders of the bankruptcy court that precise distribution became immutable, and the distributing agent, King, was bound thereon and was compelled to make distribution according to the distribution sheets or stand in contempt of the bankruptcy court. But the duties of the distributing agent in performing the final function of distribution of a debtor's estate to creditors are not different in any substantial way from those imposed on a receiver in equity, a receiver in bankruptcy, or a trustee in bankruptcy acting under the order of the court which appointed him. Changes in distribution can be effected upon timely application to the court. Negligence is apparent in the situation at bar. Moreover, in the case at bar it should be noted that King was not only the distributing agent but that prior to the Chapter XI proceeding, King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. Indeed, as we have pointed out at an earlier point in this opinion, Seeley's counsel stated that there would be available at all times $20,000 or more to dispose of the claim of the United States "in cash". Putting it plainly, we do not think that the equities here weigh very heavily in favor of King.

We point out also that Section 192 is a very old statute. It was derived from the Act of March 2, 1799, 1 Stat. 676, and was designed for one purpose only, to aid in the collection of sums due the United States. It will be observed that the statute is exact in its terms and provides that "Every executor, administrator or assignee or other person . . . who pays . . . any debt due by the . . . estate for . . . which he acts before he . . . pays the debts due the United States from such . . . estate shall become answerable in his own person and estate", for the debt due the United States. There is nothing in the statute as to the "control" of the fund by the disbursing individual. The

critical phrase is a very uncomplex one; it is simply he "who pays". It is a statute intended by Congress as a final backstop for the protection of the federal fisc. We conclude that King is personally liable. See Field *v.* United State, 34 U.S. (9 Pet.) 182 (1834); United States *v.* Barnes, 31 Fed. 705, 707 (C.C.S.D. N.Y. 1887). See also United States *v.* Weisburne, 48 F. Supp. 393, 397 (E.D. Pa. 1943).

In reaching this conclusion we are not unmindful that the appellees have asserted a doctrine of estoppel against the United States. In this connection we need say only that estoppel is not available as a defense against the United States.

The judgment of the court below will be reversed. The case will be remanded with the direction to enter judgment in favor of the United States in accordance with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 8, 1962 in this case be, and the same is hereby reversed and the cause remanded with the direction to enter judgment in favor of the United States in accordance with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

September 13, 1963.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 654

ELIZABETH SIMONSON KING, EXECUTRIX OF THE ESTATE OF GEORGE STEWART KING, DECEASED, AND NATIONAL SURETY CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Although we believe that the decision below is correct, we do not oppose the petition. It appears that there is a conflict of decisions between the court below and the Court of Appeals for the Fifth Circuit, and that the issues involved are recurrent.

1. This litigation involves the interpretation of R.S. § 3467, 31 U.S.C. 192, which subjects to personal liability "Every executor, administrator, or assignee, or other person, who pays * * * any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate * * *." That Section pro-

716-346—64

vides the sanction for violation of R.S. § 3466, 31 U.S.C. 191, which directs, *inter alia*, that the debts due to the United States shall be first satisfied when a debtor is insolvent and his insolvency is manifested by the commission of an act of bankruptcy.

The United States instituted this action under 31 U.S.C. 192 to subject petitioner's decedent, George S. King, to personal liability for violation of 31 U.S.C. 191. A referee in bankruptcy, pursuant to Section 337 of the Bankruptcy Act, 11 U.S.C. 737(1), had appointed King the distributing agent of a debtor corporation in an arrangement proceeding under Chapter XI of the Bankruptcy Act; 11 U.S.C. 701, *et seq.* King, who was also president of the corporation, was directed to carry out the plan of arrangement by distributing a fund of $160,193.68 to be deposited by the debtor. The plan of arrangement contained no written provision concerning the government's then unliquidated claim;[1] however, that claim was orally referred to by counsel for the debtor at the hearing on the plan and the referee allowed the government additional time to file its proof of claim. King was present in the courtroom at the time of the hearing on the plan.

Between March 21, 1947, the date of the hearing on the plan of arrangement, and May 9, 1947, the date on which the government filed its preliminary proof of claim in the amount of $26,818.82, all but $6,085.01 of the fund deposited with the distributing agent had

[1] That claim, the validity of which is not in dispute in this litigation, arose out of contracts between the debtor and the Department of the Army.

been paid to creditors other than the government, including the sum of $42,829.76 paid by King to himself as a creditor of the bankrupt. This action was brought to recover the sum of $25,831.08 from King; judgment for $10,000 was sought from his surety.

The court below held that King, as distributing agent, was within the class of persons named by 31 U.S.C. 192 in the phrase "Every executor, administrator, or assignee, or other person" as being subject to personal liability for violation of the priority accorded the government by 31 U.S.C. 191. The court recognized that "Sections 191 and 192 of 31 U.S.C.A. must be interpreted *in pari materia*, as parts of a 'common statutory scheme'" (Pet. App. 20–21). It rejected petitioners' claim that a distributing agent, as a mere arm of the court, was compelled to follow the distribution established by the bankruptcy court, and was, therefore, relieved of personal liability for violations of 31 U.S.C. 191. The court noted that changes in distribution could have been effected by the distributing agent—in the same way a receiver or trustee in bankruptcy may effect such changes—by timely application to the bankruptcy court.[2]

[2] That King knew of the government's claim at the time he made the payments asserted to be in violation of Section 192 is clear. As the court below pointed out, King, as president of the debtor corporation prior to the Chapter XI proceeding, "well knew or should have known of the unresolved claim of the United States" (Pet. App. 26). Furthermore, the stipulation of facts between the parties noted that King was present in the courtroom at the hearing on the plan of arrangement, at which time counsel for the debtor corporation orally referred to the government's claim.

2. The decision of the court below is in conflict with the decision of the Fifth Circuit in *United States* v. *Stephens*, 208 F. 2d 105, which held 31 U.S.C. 192 inapplicable to a court-appointed receiver. The Fifth Circuit interpreted the statute as subjecting to liability only personal representatives of the debtor, *i.e.*, those standing in relation to the debtor as agents or as similar representatives. It reasoned that the designation "or other person" in the statute limits those standing as personal representatives to one "who pays in whole or in part any debt *due by the person or estate for whom or for which he acts*" (emphasis in original). 208 F. 2d at 108. The court therefore concluded that Section 192 could not be applied to a receiver, a person who acts for and under the court rather than for the debtor.

The Fifth Circuit's reasoning was rejected both by the court below and by the Ninth Circuit in *United States* v. *Crocker*, 313 F. 2d 946. In the latter case, the court stated (313 F. 2d at 949) that:

> [T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor: the phrase "for whom, or for which he acts" should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191.[3] * * *

[3] The Ninth Circuit went on to say that: "In terms of the purpose of the two sections, the significant characteristic which persons in the classes named in Section 191 [*sic* Section 192] have in common is not that they represent debtors rather than

In our view, the court below, and the Ninth Circuit in the *Crocker* case, correctly interpreted Section 192. In bankruptcy proceedings the court exercises a general supervisory function and it is the duty of the distributing agent or receiver to inform the court of any priorities which must be honored. Approval of a distribution in contravention of a right of priority would not be given by the court knowingly, but only on the advice of the distributing agent, receiver, or other person. When an "officer of the court"—whether executor, administrator, distributing agent, or receiver—pays a debt out of the funds entrusted to him, he is obviously not paying the court's debt; he is paying, albeit under the control of the court, the debt of the person or estate whose property is in his care. Each official is an "officer of the court" in that his actions must be approved by the court, but he is a "personal representative" with regard to his dealings with the debtor's assets. Thus, a distributing agent or receiver, like an executor, administrator, or assignee, is "acting for" a debtor within the meaning of Section 192 simply by virtue of the fact that he is empowered to deal with his property.

---

courts, but rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations." 313 F. 2d at 949. The court below referred to this reasoning and concluded that not even "control" of the fund by the disbursing individual was required as a prerequisite to Section 192 liability. It noted that the statute does not require "control", but rather states that "every * * * other person, who pays * * *" in disregard of the government's Section 191 priority shall be liable, regardless of control.

Cf. *Field* v. *United States*, 9 Pet. 182.[4] The Fifth Circuit's holding to the contrary undermines Sections 191 and 192. Under the *Stephens* decision, court-appointed representatives of debtors involved in bankruptcy proceedings may knowingly ignore the priority in payment accorded the government by Section 191 and thereafter assert *pro forma* court approval of their action as a defense to their personal liability under Section 192.

CONCLUSION

For the foregoing reasons, we do not oppose the petition for a writ of certiorari.

Respectfully submitted,

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DECEMBER 1963.

[4] In *Field*, this Court expressly rejected the contention that a court order approving the distribution provided a defense to a suit by the United States to impose personal liability on trustees in bankruptcy who had disregarded the government's priority.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 16

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, Deceased, and NATIONAL SURETY CORP.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 654.

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, Deceased, and NATIONAL SURETY CORP.,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the District of New Jersey (R. 12-23) is reported at 208 F. Supp. 697. The opinion of the United States Court of Appeals for the Third Circuit (R. 30-40) is reported at 322 F. 2d 317.

Jurisdiction of this Court.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 13, 1963 (R. 40-41).

The petition for writ of certiorari was granted on January 13, 1964 (R. 42), 375 U. S. 983 (1964).

The Statutes Involved.

Sec. 64, Ch. VII, of the Bankruptcy Act, 11 U. S. C. sec. 104, provides in pertinent part:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States of America, who by the laws of the United States of America is entitled to priority, * * *"

Sec. 337, Ch. XI, of the Bankruptcy Act, 11 U. S. C. sec. 737, provides in pertinent part:

> "*Same; conduci and business after acceptance of arrangement.*
>
> At such meeting, or in any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—
>
> (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited

by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation not in excess of the compensation allowable to a receiver under this title."

Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 provide:

"Section 191. *Priority Established.*

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

"Section 192. *Liability of Fiduciaries.*

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Question Presented.

May a distributing agent appointed to distribute some of the funds of the debtor corporation under a plan of arrangement in Chapter XI of the Bankruptcy Act, 11 U. S. C. sec. 737, or his surety, be held liable under the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, for the payment of a claim of the United States of America where the said agent, pursuant to the order of the court, has disbursed all of the funds coming into his possession?

Statement of the Case.

This suit was brought by the United States of America against the distributing agent in bankruptcy of a corporation, and his surety, to subject the agent to personal liability pursuant to Rev. Stat. sec. 3466, 31 U. S. C. sec. 192, for his alleged failure to honor the government's debt priority under Rev. Stat. sec. 3467, 31 U. S. C. sec. 191. The United States District Court for the District of New Jersey had jurisdiction of the subject matter under 28 U. S. C. sec. 1345.

1. The Facts.

On October 1, 1946, the Seeley Tube and Box Company, Inc., a New Jersey corporation, filed petition in the District Court for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. sec. 701, *et seq.* (R. 13). With the petition, the debtor filed a statement of executory contracts, including a number of government contracts with the Picatinny Arsenal (R. 13-14). A few days later, the United States gave notice to the debtor of its intention to

terminate two of these contracts because of the debtor's default in performance, and, on November 18 and 19, 1946, they were terminated (R. 13). The Government reserved its right to hold the debtor liable for any damages that might result from the re-letting of the contracts (R. 13).

On February 28, 1947, the debtor filed an amended plan of arrangement which provided for the payment in full of all unsecured debts (R. 5). On March 17, a referee in bankruptcy appointed George Stewart King to be distributing agent, pursuant to 11 U. S. C. sec. 737 (1), *supra*, at pgs. 2, 3, his duties thereunder being to distribute a fund of $160,193.68 to be deposited by the debtor (R. 13; 11). The National Surety Corporation gave bond in the amount of $10,000.00 for the faithful performance by King of his duties (R. 13). On March 21, 1952, the bond was reduced to $4,000.00 by court order (R. 13).

A hearing on the confirmation of the amended plan of arrangement was held by the referee on March 21, 1947. The plan contained no written provision as to the Government's claim, which was not yet liquidated (R. 14). However, during the hearing, the counsel for the debtor remarked that there might be an outstanding claim, amounting to perhaps $20,000.00, with respect to the Picatinny Arsenal contracts (R. 14). In discussion with the referee, he asserted that "the debtor company will deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it" and, further, that "we have $94,000.00 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000.00 or more available to dispose of that claim, in cash" (R. 14-15). The referee then entered an order

confirming the plan of arrangement and directing King to carry it out as follows (R. 14; 11):

> "2. G. Stewarf King, as distributing agent of debtor be, and he is hereby authorized, directed and empowered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court;"

On April 14, 1947, an order was entered directing the United States of America to file its claim on or before May 9, 1947 (R. 15). On May 9, 1947, the United States of America filed its preliminary contingent proof of claim in the amount of $26,818.82. The aforesaid claim alleged that the United States of America was a priority creditor (R. 15-16).

Between March 21, 1947, the date of hearing, and May 9, 1947, the distributing agent had, in accordance with his orders received on March 21, 1947, and in accordance with orders and arrangement sheets also received by him on March 21, 1947, signed and sent to the referee for countersigning and transmittal, checks disbursing all but $6,085.01 of the money deposited with him (R. 16). Each check had been issued pursuant to a court order and was countersigned by the referee in bankruptcy (R. 16). The $6,085.01 was subsequently distributed as follows (R. 16):

United States of America	$3,620.39
Creditors having a priority to United States of America	1,057.55
Creditors not having a priority	1,407.07
	$6,085.01

On March 30, 1949, the Government amended its claim to $34,125.03 (R. 16). The referee ruled, on December 8, 1953, that the claim of the Government had been timely filed for purposes of the Bankruptcy Act, a ruling which was reversed by the District Court on review, *In re Seeley Tube and Box Company,* 120 F. Supp. 269 (D. N. J. 1954) (R. 16). On appeal, the United States Court of Appeals for the Third Circuit reinstated the referee's decision holding that:

> "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefor in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." *In re Seeley Tube and Box Company,* 219 F. 2d 389, at 391 (3d Cir. 1955), cert. denied, 350 U. S. 821 (1955).

On August 2, 1956, the bankruptcy court entered an order approving King's final report and account, discharging him of his trust, and also cancelling the surety's bond (R. 17).

2. Proceedings Below.

The instant suit was brought by the United States against King and his surety company on the ground that King was subjected to personal liability by Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 *supra,* p. 3, because he had failed to make payment to the Government as a priority creditor, as required by Rev. Stat. sec. 3466, 31 U. S. C. sec. 191, *supra,* p. 3. On King's death, his widow, as executrix of his estate, was substituted as party defendant (R. 12).

The District Court dismissed the Government's complaint, holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U. S. C. sec. 192, *United States* v. *King*, 208 F. Supp. 697 (D. N. J. 1962). The Court of Appeals reversed this decision by an opinion and order filed September 13, 1963 (R. 30-41), 322 F. 2d 317. On January 13, 1964 this Court granted certiorari (R. 42), 375 U. S. 983.

Summary of Argument.

Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, have from the earliest days been read in *pari materia*. An individual can not be held liable under sec. 192 unless he has failed to pay a debt due the United States within the meaning of sec. 191. We contend that in the case at bar sec. 191, and therefore 192, does not apply because (1) the debtor was not legally insolvent and (2) because the debtor had never manifested its insolvency in one of the three modes set forth in the statute. The courts have held that each of these two requirements must be met before the debt is one within the meaning of sec. 191.

Even assuming that the failure to meet these requirements does not prevent the application of secs. 191 and 192 to our case, the distributing agent, King, should not be held liable since he received substantially less than all of the assets of the debtor. It would be both illogical and unfair to hold a representative liable under sec. 192 when the debtor has retained substantial assets which might be used to pay the government's claim. Nor was it within the meaning of sections 191 and 192 or their predecessor stat-

utes dating back to 1797, all of which contemplated placing this liability on persons who had control of *all* of the assets of the debtor.

In any event the distributing agent in the instant case should not be held liable since he was merely an arm of the court and followed its orders explicitly. There is no case in which a receiver or a distributing agent who followed the orders of the court has been held liable under sec. 192. In the case of *United States* vs. *Crocker*, 313 F. 2nd 946 (9th Cir. 1963), the receiver acted without court authorization or approval. On those facts therefore, *United States* vs. *Crocker, Ibid,* is not in conflict with *United States* vs. *Stephens,* 208 F. 2nd 105 (5th Cir. 1953). In *Crocker* the receiver, when he ceased to follow the orders of the court, was acting on his own and not as an officer or arm of the court. In the instant case the distributing agent was acting solely as an officer or arm of the court within the meaning of those terms as defined in *United States* vs. *Stephens, supra,* and therefore, was not an "other person" who could be held liable to the United States under sec. 192.

ARGUMENT.

I.

Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191 and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192 do not apply to the case at bar since the debtor corporation was not insolvent.

Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, is taken almost verbatim from Section 5 of "An Act to provide more effectually for the settlement of Accounts between the United States and Receivers of Public Money". Act March 3, 1797, ch. 20, Sec. 5, 1 Stat. 515.[1]

Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, is taken almost verbatim from a portion of Section 65 of "An Act to regulate the collection of duties on imports and tonnage" Act March 2, 1799, ch. 22, Sec. 65, 1 Stat. 676.[2]

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[1] Section 5, Ch. 20 of Act of March 3, 1797, 1 Stat. 515, provides:

> "Section 5. And be it further enacted, That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed. (a)"

[2] Section 65, Ch. 22, of Act of March 2, 1799, 1 Stat. 676, provides in pertinent part:

> "Sec. 65 And be it further enacted, That where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith and without delay,

These statutes have from the earliest days been read in *pari materia*. *Thelusson* v. *Smith*, 2 Wheat. 396 (1817); *United States* v. *Lutz*, 295 F. 2nd 736 (5th Cir. 1961); *United States* v. *Western Union Telegraph Co.*, 50 F. 2d 102 (2d Cir. 1931).

Sec. 65 of Act of 1799, 1 Stat. 676, was interpreted to apply only where there was an insolvency in the technical sense. Mr. Justice Duval in *Prince* v. *Bartlett*, 8 Cranch 431, 434 (1814), said:

> "Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law—not a value allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors, it would be difficult to ascertain."

Subsequent cases have established that the mere inability of a person to pay all of his debts does not give rise to a priority in favor of the United States under section 191. The government must show that the debtor's liabilities are greater than his assets. *Thelusson* v. *Smith*, *supra*; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 438-439 (1828);

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cause a prosecution to be commenced for the recovery of the money thereon by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; * * *"

United States v. *Oklahoma*, 261 U. S. 253 (1923); *United States* v. *Press Wireless*, 187 F. 2d 294 (2d Cir. 1951); Annot., 169 A. L. R. 626 (1946).

In *United States* v. *Oklahoma, supra,* the United States had filed a bill in equity against the state which the state moved to dismiss for insufficiency. The bill alleged that the state by a statutory commissioner had taken possession of the assets of one of the state's own banks; but it did not allege that the assets were insufficient to pay the debts. The Court granted the state's motion to dismiss, saying, at p. 260:

> "Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part."

In *United States* v. *Press Wireless, supra,* a case similar to the case at bar in that it involved a debtor corporation which had filed a petition under Chapter XI of the Bankruptcy Act, the court held that the United States was not entitled to priority under section 191 because there was no proof that the debtor corporation was insolvent within the meaning of the statute. The court reviewed the history of section 191, considered the effect of *United States* v. *Oklahoma, supra,* and concluded that insolvency is a *sine qua non* of the statute.

While the above cases involve Sec. 191, *United States* v. *Lutz*, 295 F. 2d. 736 (5th cir. 1961), deals directly with Sec. 192. In that case it was held that an individual would

not be liable to the United States under this section unless the debtor for whom he acted was insolvent when payments were made to creditors other than the United States.

In the case at bar there was no allegation in the complaint of the insolvency of the debtor corporation. At the hearing before the Referee in Bankruptcy on March 21, 1947, the attorney for the debtor corporation indicated that there was $94,000 left over after provision being made for the claims of the creditors except the United States of America (R. 14-15). At that time provision had been made to pay all the creditors in full (R. 5). *In Re Seeley Tube & Box Co.*, 120 F. Sup. 269, 271 (D. N. J. 1954) and *In Re Seeley Tube & Box Co.*, 219 F. 2d 389, 390 (3rd Cir. 1955). Absent the legal insolvency of the debtor corporation, neither Sec. 191, nor Sec. 192 which is interpreted in relation to Sec. 191, applies.

II.

Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, do not apply to the case at bar since the debtor corporation had not made an assignment of its assets, or committed an act of bankruptcy.

Again reading the two sections together, we contend that even if the lack of insolvency of the debtor corporation does not in itself prevent the statutes from applying to our case, yet the other requirements of the statutes have not been met.

In interpreting 31 U. S. C. Sec. 191, this Court has held that by appending to the phrase, "wherever any person

indebted to the United States is insolvent" a series of situations, Congress intended to confine the operation of the statute to the situations selected. First announced in *United States* v. *Hooe*, 3 *Cranch* 73, 91 (1805) and later in *Beaston* v. *Farmer's Bank*, 12 Pet. 102, 133 (1838), we find the rule again exemplified in 1923 in *United States* v. *Oklahoma*, 261 U. S. 253, 262, Mr. Justice Butler saying:

> "In order to give the priority specified in Sec. 3466 there must be a case of an insolvent debtor who makes a voluntary assignment of his property, or a case in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or a case in which an act of bankruptcy is committed."

In *Bramwell* v. *United States Fidelity & G. Co.*, 269 U. S. 483 (1926), insolvency of a defunct bank having been conceded by the parties, the Court proceeded to determine whether there had been either a voluntary assignment of its property or the commission of an act of bankruptcy, on the theory that insolvency must be manifested in one of the three modes set forth in the statute.

None of these three modes of insolvency was manifested in the case at bar.

Our case does not involve an absconding, concealed, or absent debtor.

Nor was any act of bankruptcy committed in our case. The debtor corporation had filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. 701, *et seq.* No receiver or trustee was ever appointed. The complaint of The United States does not al-

lege that the debtor corporation committed an act of bankruptcy.

There was not any voluntary assignment of the property of the debtor. To counsel's knowledge there is no case in point on the question of whether the filing of a voluntary petition for a plan of arrangement under Chapter XI of the Bankruptcy Act constitutes an assignment of the debtor's property within the meaning of the term as used in Sec. 191. If it is deemed that there is such an assignment merely by reason of the filing of a Chapter XI proceeding, then it must necessarily be an assignment from the debtor to the Court. See *Weiss* v. *Fleetwood Bank*, 261 App. Div. 572, 26 N. Y. S. 2d 583, 586 (App. Div. 1941). If the assignment be from the debtor to the court, it is the court, not the distributing agent, who in our case was the "other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts" within the meaning of Sec. 192. On the other hand, if there was no assignment, then the requirements of Sec. 191 have not been met and therefore Sec. 192 does not apply.

We contend that there was no assignment within the meaning of Sec. 191. There was no voluntary assignment because the debtor corporation was never divested of all of its assets. The debtor corporation apparently had at least $94,000 which was not turned over for distribution, as will be discussed further in connection with Point III of this argument (R. 14-15). It has been held that there must be a transfer of all of the debtor's assets to constitute a voluntary assignment within the meaning of Sec. 191. In *United States* v. *Hooe*, 3 Cranch 73, 91 (1805), the Court, construing the meaning of the provision as to voluntary

assignment of property in the Act of March 3, 1799, ch. 20, Sec. 5, from which our Sec. 191 is derived, stated:

> "The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property' as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words 'or part thereof,' or others of similar import, would have been added."

III.

31 U. S. C. Sec. 192 does not apply to the case at bar because the distributing agent, King, never received all of the debtor corporation's assets.

Sec. 192 makes liable:

> "* * * every executor, administrator or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate * * *."

Being a penal statute, it should be strictly construed. It is significant that the statute makes the representative, not the debtor himself, personally liable. It appears that Congress contemplated a complete transfer of the debtor's assets to a third party who is in effect made a trustee for the United States and is bound to pay that debt first out of the proceeds of the debtor's property. The courts therefore have required that there be a divestment of all the debtor's property before Sec. 191 applies. *United States* v.

Hooe, 3 Cranch 73, 91 (1805); *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 438-439 (1828); *Beaston* v. *Farmers Bank*, 12 Pet. 102, 133 (1838); *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Corp.*, 26 F. 2d 839 (D. N. Y. 1928); *Smith* v. *United States*, 113 F. Supp. 702, 707 (D. Hawaii 1953). *A fortiori* this reasoning should apply to Sec. 192. Any other interpretation would make it burdensome in the extreme for one to act in a representative capacity. Also it would be illogical to interpret this statute as making such a representative liable when the statute does not make liable the principal who retained part of the assets.

In the instant case all of the assets were not turned over to King as distributing agent. The debtor corporation apparently still had at least $94,000 in assets which were not turned over to King for distribution (R. 14-15). The debtor corporation's counsel so represented in open court (R. 14-15). The court and the government acquiesced in this withholding of assets by the corporation. Neither the court nor the government ever required the debtor corporation, Seeley Tube and Box Company, Inc., to turn over this $94,000 to the Court or to the distributing agent, King. For eleven years the government sought to satisfy its claim from this sum of $94,000 held by the corporation. The government filed its claim and litigated its claim with the debtor corporation from May 9, 1947 to February 9, 1955. Thereafter, on August 2, 1956, the government permitted the discharge of the distributing agent, and the discharge of the surety bond. No action against the distributing agent was instituted by the government until July 3, 1958. In the intervening 11 years the government was looking to the $94,000 held by the corporation, not to

the $160,193.69 deposited with the distributing agent. In 1958 after the $94,000 had apparently been exhausted by the corporation, the government turned to the distributing agent. This we submit is a far cry from the situation contemplated by Sec. 191 and Sec. 192—the situation where only one fund is available for the Government to collect from, namely that held by the transferee of all the assets of an insolvent debtor.

IV.

A distributing agent should not be held liable under Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, where he followed explicitly the orders of the court in his distribution.

In *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953), a receiver appointed by a state court for an insolvent corporation followed schedules and orders of the court and as a result the debtor's fund had been exhausted by paying other creditors in advance of satisfying priority claims due to the United States The United States commenced suit under Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, to hold the receiver personally liable for the debt, but the District Court dismissed the complaint on the ground that Sec. 192 is not applicable to court appointed receivers, *United States* v. *Stephens* (not reported). The dismissal of the complaint was affirmed on appeal, *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953). The Court of Appeals pointed out that Sec. 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by title and construed the words "or other person" as being

"* * * limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any *debt due by the person or estate for whom or for which he acts'.*" *United States* v. *Stephens*, Id., at p. 108. (Emphasis in original). The court asserted that the defendant as a receiver was an officer or arm of the court acting for the court rather than for the debtor. It concluded that the defendant was not within the purview of Sec. 192, and that the suit was properly dismissed.

There is no case which has come to counsel's attention in which a receiver or distributing agent who followed explicitly the orders of the Court has been held individually liable under Sec. 192. There is one case, the case of *United States* v. *Crocker*, 313 F. 2d 946 (9th Cir. 1963), where a receiver acting without court authorization or approval was held liable. The fact that the receiver in *Crocker* was acting without the approval of the court is specifically referred to in the lower court's opinion, *United States* v. *Crocker*, 194 F. Supp. 860, 861 (D. Nev. 1961). Thus the holding in *United States* v. *Crocker* is really no more than a case in line with the holding in *In Re J. B. Pollack Co., Inc.*, 86 F. 2d 99 (2d Cir. 1936), where a distributing agent was held liable to creditors when payments were made without proper order, resulting in a depletion of the fund so that creditors' claims could not be satisfied. The court in both those cases held the individual liable because he was no longer acting as an agent of the court but was, on his own initiative, taking on a responsibility and acting in the same manner as might an "executor, administrator

or assignee." He was not acting strictly as an arm of the court.

In *United States* v. *Sachs*, 217 F. Supp. 545 (D. Md. 1963), a receiver was also held liable for disregarding the right of priority of the government in distributing the assets of an insolvent corporation. The opinion does not state whether the court ordered this distribution, whether the receiver disregarded a contrary order, or whether no order was made. It would seem probable from the court's language and from the fact that a proof of claim had been filed by the government prior to any distribution, that the distribution was either made without an order of court or in contravention of such order.

The distributing agent in the case at bar was appointed by the court concurrently with the deposit by the debtor corporation of a sum sufficient to consummate its plan of arrangement with unsecured creditors. Since the debtor had remained in possession, some functionary was necessary to act as the arm of the court in the preparation of the necessary dividend checks as directed by the court. The defendant, King, was not directed to inquire into the affairs of the debtor to determine what priority claims existed nor was any provision made to compensate him for so doing. He was appointed to act as an arm of the court in carrying out the provisions of 11 U. S. C. Sec. 737. He was ordered to perform the following duty (R. 11):

> "• • • the said distributing agent being hereby directed on receipt of such consideration to deposit said funds in an account to be opened in any qualified bankruptcy depository in this district, subject to the control and order of this Court."

Thereafter, upon confirmation, he was further ordered as follows (R. 11):

> "G. Stewart King, as distributing agent of debtor be and he is hereby authorized, directed and empowered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court."

Subsequently, orders for the distribution were made by the court giving the name of each person to whom distribution was to be made together with the amount of such distribution.

Thus the distributing agent's function was purely a ministerial one. His sole discretion was in the selection of a "qualified bankruptcy depository in this district". It cannot be denied that in the instant case the defendant, King, faithfully carried out the order of the court. It is a matter of record that the defendant accounted to the court and was discharged of his trust (R. 17). In fact, the charge directed at the defendant, King, is that he did carry out the orders of the court and that his obedience to these orders renders him liable to the United States of America.[3]

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[3] The court below did say (R. 39):

> "* * * Negligence is apparent in the situation at bar. Moreover, in the case at bar it should be noted that King was not only the distributing agent but that prior to the Chapter XI proceeding, King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. Indeed, as we have pointed out at an earlier point in this opinion, Seeley's counsel stated that there would be available at all times $20,000 or more to dispose of the [fol. 42]

The law is clear that a ministerial officer may not act in any manner other than in compliance with the orders of the court. *Stearns, Suretyship*, Sec. 9.27, p. 341 (5th Ed. 1951). The failure of such a representative to pay out funds as directed by the court may render him in contempt and also make him personally liable to those entitled to share in the funds. 9 *Remington, Bankruptcy Law*, Sec. 3598, p. 238 (6th Ed. 1955). The rule applies to a special commissioner and to a receiver. 9 *Appleman Insurance Law and Practice*, Sec. 5445, p. 297, and Sec. 5479, p. 376 (1943). The same rule applies to a distributing agent. *In Re Empire Shoe Corporation*, 16 F. Supp. 713 (D. N. Y. 1936). In the case of *In Re Empire Shoe Corporation, Ibid*, the court held that a depository acting as distributing agent was absolutely entitled to rely on certified copy of schedules furnished by the referee and that a priority creditor who was overlooked by those schedules should not be allowed to recover against the distributing agent. The court said at page 715:

> "It would be unfair to hold it [the distributing agent] financially responsible for mistakes of others."

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claim of the United States 'in cash.' Putting it plainly, we do not think that the equities here weigh very heavily in favor of King."

We contend these conclusions of negligence or lack of equity in Mr. King's favor are unjustified. The only evidence presented is that the debtor corporation had $94,000.00 in its possession in addition to the $160,193.69 deposited with the distributing agent (R. 14-15). Mr. King was undoubtedly relying on that $94,000.00 to pay the contingent claim of the United States of America. That the money was not there in 1958 offers no basis to infer negligence or misfeasance on the part of Mr. King as distributing agent in 1947. The government made no attempt to establish negligence or misfeasance though Mr. Freeman, who made the representation as to the retention of the $20,000, was available for examination. He also is now deceased.

Mr. King was acting under strict and binding orders which gave him no freedom of action and absolutely no discretion except perhaps the choice of which bank to use to deposit money in. His title, distributing agent, in itself implies a complete lack of power to act on his own. He was in no sense a distributing or paying person such as is implied in Sec. 192 by the words "any other person". The person who distributed or paid in the case at bar was the court itself. Mr. King should no more be charged with responsibility here for the government's loss than should the Private in the Army for the loss of a battle when he has done precisely what he was told.

Conclusion.

The judgment of the Court of Appeals should be reversed and the decision of the District Court affirmed.

Respectfully submitted,

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Date: August 12, 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 16

ELIZABETH SIMONSON KING, EXECUTRIX OF THE ESTATE OF GEORGE STEWART KING, DECEASED, AND NATIONAL SURETY CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 12–23) is reported at 208 F. Supp. 697. The opinion of the court of appeals (R. 30–40) is reported at 322 F. 2d 317.

JURISDICTION

The judgment of the court of appeals (R. 40–41) was entered on September 13, 1963. The petition for a writ of certiorari was filed on December 2, 1963, and was granted on January 13, 1964 (R. 42). 375 U.S. 983. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Bankruptcy Act, 30 Stat. 544, as amended, provides in pertinent part:

> SECTION 64 [11 U.S.C. 104]
> Debts which have priority.
>
> (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *
>
> * * * * *
>
> (5) debts owing to any person, including the United States, who by the laws of the United States in [1] entitled to priority, * * *
>
> * * * * *
>
> SECTION 337 [11 U.S.C. 737]
> Same; conduct and business after acceptance of the arrangement.
>
> At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—
>
> (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation, not in excess of the compensation allowable to a receiver under this title;
>
> * * * * *

[1] The word "in" appears in the original text of the 1938 amendment to the Act. 52 Stat. 874. It probably should read "is."

2. R.S. § 3466, 31 U.S.C. 191, provides:

> § 191. Priority Established.
>
> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

3. R.S. § 3467, as amended, 31 U.S.C. 192 provides:

> § 192. Liability of fiduciaries.
>
> Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

QUESTION PRESENTED

Whether a distributing agent appointed in a proceeding under Chapter XI of the Bankruptcy Act, who does not honor the government's debt priority under R.S. § 3466, 31 U.S.C. 191, is subject to the

imposition of personal liability for the amount of the debt pursuant to R.S. § 3467, 31 U.S.C. 192.

STATEMENT OF THE CASE

This action was brought by the United States against petitioner's decedent, George S. King, the distributing agent in a proceeding under Chapter XI of the Bankruptcy Act, and the National Surety Corporation, the surety on King's bond. The claim was that they were liable under R.S. § 3467, 31 U.S.C. 192, for King's paying the claims of the bankrupt's non-priority creditors and thereby so depleting the assets of the bankrupt's estate that a claim of the United States entitled to priority under R.S. 3466, 31 U.S.C. 191, could not be paid in full (R. 30–31).[2] The relevant facts are stipulated (R. 17).

1. BACKGROUND OF THE LITIGATION

On October 1, 1946, the Seeley Tube and Box Company, Inc., a New Jersey corporation, filed a petition in the district court for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. 701, *et seq.* (R. 13). The United States was not scheduled as a creditor in the petition. However, in annexed schedules, certain executory contracts between Seeley and the Picatinny Arsenal were listed (R. 14). Shortly after the petition was filed, the United States advised

[2] King died testate after the commencement of the action, and petitioner, as his executrix, was substituted as a party defendant. An action by the United States against a fiduciary under R.S. § 3467, 31 U.S.C. 192, does not abate when the fiduciary dies, but survives against his executrix. See *United States v. Dorey*, 39 Fed. 251 (C.C., S.D.N.Y.).

Seeley of its intention to terminate the executory contracts because of Seeley's default in performance. The contracts were terminated on November 18 and 19, 1946, and Seeley was advised that it would be liable for any damages which might result from the reletting of the contracts (R. 13). Such damages did in fact result.

An amended plan of arrangement was filed by Seeley on February 28, 1947. It provided for the payment in full of all unsecured creditors, but did not contain any written provisions for payment of the then unliquidated claim of the United States (R. 5, 32). On March 17, 1947, a referee in bankruptcy appointed George Stewart King, petitioner's decedent and the then president of Seeley, as Seeley's distributing agent in bankruptcy (R. 13, 31–32). King filed a $10,000 bond of the National Surety Corporation as surety for the faithful performance of his duties; the amount of the bond was later reduced to $4,000 pursuant to court order (R. 13).

On March 21, 1947, a hearing on the amended plan of arrangement was held before the referee in bankruptcy. The records of the Clerk of the Bankruptcy Court reflect King's appearance in court on that date. Also present was the attorney for the debtor corporation, Mr. Freeman (R. 14, 15). During the course of the hearing, the referee inquired about the possibility of a claim being filed by the Picatinny Arsenal. Freeman acknowledged that "[t]he Picatinny Arsenal may have some claim," and that "they may claim $20,000" (R. 14). Freeman then asserted that

"the debtor company will deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it" and, further, that "[w]e have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim in cash" (R. 14–15). The referee then entered an order confirming the plan of arrangement and directing King to carry it out (R. 11, 14). Shortly thereafter, the referee also entered an order directing the United States to file its claim on or before May 9, 1947 (R. 15).

On May 9th, the United States filed its preliminary contingent proof of claim in the amount of $26,818.82,[3] and asserted priority of the claim under Section 64 of the Bankruptcy Act, 11 U.S.C. 104, and R.S. § 3466, 31 U.S.C. 191 (R. 15–16). However, between March 21—the date of the hearing at which the plan of arrangement was approved—and May 9—the date that the United States filed its claim—most of the funds which had been deposited with King as distributing agent had been paid out by him to other creditors of the debtor, and only $6,085.01 of $160,193.68 remained (R. 14, 16). The payments had been made by check, and each check had been issued pursuant to a court order and countersigned by the referee in bankruptcy (R. 16).[3] King paid $42,829.76

[3] The claim was amended on March 30, 1949, to $34,125.03, after the damages sustained by the government due to Seeley's default had been more accurately determined (R. 16).

to himself, as a creditor of the bankrupt.' Of the $6,085.01 of the debtor's assets which remained, $1,407.07 was later paid to creditors who did not have a priority over the United States, and $1,057.55 was paid to creditors who did have such a priority (*Ibid.*) Thus of the original $160,493.68 the debtor corporation had deposited with King for the payment of all creditors, only $3,620.39 was paid to the United States on its priority claim of $34,125.03.

On December 8, 1953, the referee in bankruptcy ruled that the United States' claim of May 9, 1947, had been timely filed and that the debtor's plan of arrangement had been confirmed upon the condition that adequate provision be made for payment of the government's claim in the event it was determined to be allowable in an amount not in excess of $94,000 (R. 16). On review, the district court reversed, holding that the claim of the United States had not been timely filed. *In Re Seeley Tube & Box Co.*, 120 F. Supp. 269 (D.N.J.). The court of appeals in turn reversed the district court, *In Re Seeley Tube and Box Company*, 219 F. 2d 389 (C.A. 3), certiorari denied, 350 U.S. 821, ruling that "[t]he disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was * * * in performance of its duty under the Act and amounted to

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[1] King's Final Petition and Report in the arrangement proceedings, shows that on March 21, 1947, the same day the plan of arrangement was confirmed, King issued two checks to himself for $29,323.59 and $13,506.17, respectively. The Final Petition was Exhibit "A" to the government's complaint in the district court and is a part of the record.

an informal amendment of the list of creditors included in the debtor's schedules." 219 F. 2d at 391.

After King had distributed, in the manner previously indicated, the $6,085.01 of the debtor's assets which remained, he filed his final report and account. On August 2, 1956, the bankruptcy court entered an order approving them, and discharging King and the surety bond (R. 17).

2. PROCEEDINGS BELOW

The United States filed its complaint on July 3, 1958 (R. 1). Count I alleged that King was personally liable under 31 U.S.C. 192 for the unpaid amount of the government's debt[*] because he had failed to make payment to the government as a priority creditor, as required by 31 U.S.C. 191 (R. 4–7). Count II alleged the liability of National Surety to the extent of its bond on King's behalf (R. 7). On King's death, petitioner, his widow and executrix, was substituted as party defendant (R. 30, n. 1).

The district court dismissed the complaint (R. 23), holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U.S.C. 192 (R. 21). Reading the statute narrowly, the court concluded that it applied to those persons enumerated therein, *i.e.*, executors,

[*] After the allowance of certain credits and deductions, the United States' claim of $34,125.03 was reduced to $25,831.08. This sum was sought from King. Judgment for $10,000, the amount of its bond, was sought from the surety company (R. 7).

administrators, and assignees, and only to such "other person[s]" as are direct personal representatives of the debtor. It concluded that King was not such a personal representative, but acted for and with the approval of the bankruptcy court.[6] The court of appeals reversed.

SUMMARY OF ARGUMENT

This case involves the application of two intimately related statutes which date from the early days of the Republic. Section 191 of Title 31 provides that the assets of an insolvent person or the estate of a deceased debtor shall first be applied to the satisfaction of claims of the United States. Section 192 provides that any fiduciary (defined to include "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts") shall be personally liable if he fails to honor this priority. These sections, it has long been recognized, are to be read together and to be liberally construed in the light of their fundamental objective: to protect the revenue of the United States.

In the instant case, the distributing agent appointed in a bankruptcy proceeding failed to satisfy the claims of the United States although, as president of the bankrupt corporation, he was fully aware of those

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[6] The district court relied upon *United States* v. *Stephens*, 208 F. 2d 105 (C.A. 5) and the district court's decision in *United States* v. *Crocker*, 194 F. Supp. 860 (D. Nev.), both of which involved the liability of receivers under 31 U.S.C. 192. The *Crocker* case was reversed on appeal. 313 F. 2d 946 (C.A. 9).

claims. Instead, he satisfied the claims of non-priority creditors, himself included. In a subsequent proceeding instituted by the United States pursuant to 31 U.S.C. 192, the court below held that petitioners—the executrix of the estate of the distributing agent and his surety—were liable for his delinquency. The objections to this ruling are, we summit, unfounded.

It is argued that the language of Section 192 (in particular, its reference to one "who pays, * * * any debt due by the person or estate for whom or for which he acts") provides only for the liability of a personal representative, and that a distributing agent is outside this category because he is an officer of the court rather than a representative of the debtor. The short answer is that he is both: in making payments, he acts for the insolvent debtor *and* under the supervision of the court. The section cannot reasonably be construed as inapplicable to the present case. It provides for the liability of every "executor, administrator, or assignee, or other person, who pays", etc. Executors and administrators, who are specifically named in the statute, are obviously no less officers of the court than are receivers or distributing agents. Consequently, amenability to judicial supervision can not make a difference. Nor is there any rational or historical basis for imputing to Congress a purpose to afford the claims of the United States less protection when they run against an insolvent than when they are asserted against a decedent's estate.

The distributing agent is not saved from liability because the distributions made in derogation of the

government's priority were in terms covered by an order approved by the bankruptcy court. It is the agent's duty, in submitting a plan of distribution for approval, to apprise the court of any priorities for which provision must be made. This, the distributing agent here failed to do. The law does not permit him to profit from an intentional or negligent failure to disclose information which, if made available to the court, would presumably have affected its actions. *Field* v. *United States*, 9 Pet. 182.

ARGUMENT

INTRODUCTION

In this case, King, the president of a corporation which had filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, was appointed as distributing agent. Notwithstanding his awareness of the corporation's indebtedness to the United States, he distributed its assets to other creditors. This included a payment to himself which exceeded the amount of the corporation's unpaid obligation to the government.

The single question that was raised in the courts below and in the petition for certiorari was whether, in these circumstances, the distributing agent became personally liable for the corporation's debt to the United States by virtue of 31 U.S.C. 192, formerly R.S. 3467. Under that statutory provision, which derives from an enactment of the Fifth Congress in 1799, "[e]very executor, administrator, or assignee, or

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[7] *Supra*, p. 7.

other person" who acts for a debtor is "answerable in his own person and estate" for the failure to honor the government's debt priority. Petitioners insisted that a distributing agent is not within that class.

In their brief on the merits in this Court, however, petitioners attempt to avoid liability on two grounds not urged at any prior stage of the litigation.

First, they urge that the distribution by King was not in derogation of the government's debt priority under 31 U.S.C. 191, formerly R.S. 3466. Under that provision, which goes back to an enactment of the First Congress in 1789, debts due to the United States must be first satisfied "[w]henever any person indebted to the United States is insolvent"—including situations in which the person's insolvency has been manifested by the commission of "an act of bankruptcy." Petitioners now suggest that there has been no showing that the debtor corporation was legally insolvent or that it committed an act of bankruptcy.

Secondly, petitioners say that, even if it be concluded that Section 192 applies to distributing agents and that King failed to honor the government's debt priority under Section 191, there is no liability because King did not receive all of the debtor's assets. Petitioners read Section 192 as not coming into play unless the fiduciary is vested with the entire estate of the debtor.

We submit that neither of these contentions is properly before this Court under Rule 23(c). The petition for certiorari was based exclusively on an

assertion of a conflict between the court below and the Fifth Circuit[8] on the question whether fiduciaries such as receivers and distributing agents are within the ambit of Section 192. The government acknowledged this conflict and this Court presumably decided to review the ruling below for the sole purpose of resolving it.

In any event, neither of petitioners' belated assertions has any substance. Their present claim (Br. 10–13) that the debtor corporation was not shown to have been legally insolvent cannot be squared with the Chapter XI petition filed by the debtor corporation. In that petition, executed by King, who was then president of the corporation, it was necessarily asserted, in order to give the bankruptcy court jurisdiction, that the corporation was insolvent or unable to pay its debts as they matured. Section 323 of the Bankrutpcy Act, 11 U.S.C. 723.[9] Thus, there was either a literal admission of insolvency or an admission of insolvency in the bankruptcy sense. See *In Re Trans-Pacific Corporation*, 76 F. Supp. 623, 625 (S.D. Calif.), affirmed, 166 F. 1021 (C.A. 9), certiorari denied, 335 U.S. 815. In these circumstances, there was plainly no occasion for the government to allege or prove affirmatively the corporation's insolvency.

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[8] *United States* v. *Stephens*, 208 F. 2d 105.

[9] The section provides:

A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature, and shall set forth the provisions of the arrangement proposed by him, or, that he intends to propose an arrangement pursuant to the provisions of this chapter.

Equally unsound is petitioners' contention (Br. 13–16) that the debtor committed no act of bankruptcy. The debtor's petition for an arrangement under Chapter XI would clearly qualify as the sixth act of bankruptcy enumerated in Section 3(a)(6) of the Bankruptcy Act, 11 U.S.C. 21(a)(6).[10] See *In Re Rodgers-Meyers Furniture Co.*, 46 F. 2d 121, 122 (N.D. Tex.); 1 Collier, *Bankruptcy* (14th ed), Para. 3.603, p. 511; cf. *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 190. Moreover, it would appear that with the appointment of the distributing agent in the proceeding there was an act of bankruptcy within the fifth provision of the Act, Section 3(a)(5), 11 U.S.C. 21(a)(5).[11]

Nor are petitioners aided by the bizarre claim (Br. 16–18) that the distributing agent was not in possession of the entire assets of the debtor corporation's estate. Petitioners point to nothing in Section 192 which could possibly be read as imposing the requirement that the person who pays the debtor's debts in knowing disregard of the priority of the United States must be possessed of all of the debtor's assets

[10] That section provides in pertinent part:

"Acts of bankruptcy by a person shall consist of his having * * * (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

[11] "Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Collier indicates that the term "receiver or trustee" was no doubt intended to include also other distributors. 1 Collier, op. cit., Para. 3.502, p. 501, Para. 3.503, pp. 502–503.

before he can be held personally liable. It is indeed incredible that Congress would impose such a restriction. It could serve no purpose except to invite fiduciaries to avoid the consequences of ignoring the government's debt priority by the simple expedient of having the debtor withhold some small part of his assets.

We turn accordingly to the single question presented by the petition.

A DISTRIBUTING AGENT APPOINTED IN PROCEEDINGS UNDER CHAPTER XI OF THE BANKRUPTCY ACT IS PERSONALLY LIABLE FOR THE KNOWING FAILURE TO HONOR THE UNITED STATES' DEBT PRIORITY

1. THE PRIORITY STATUTES ARE TO BE LIBERALLY CONSTRUED IN LIGHT OF THEIR OBJECTIVES

The priority statutes, 31 U.S.C. 191 (formerly R.S. 3466) and 31 U.S.C. 192 (formerly R.S. 3467) are derived from Congress' earliest efforts to secure revenues for the federal treasury. Section 191's precursors, which date back to the first Congress,[12] initially accorded the government a priority in connection with bonds given to insure payment of customs duties. Later, a much broader priority was given, one providing that any debt due to the United States was to be first satisfied whenever any person indebted to the United States by bond or otherwise was insolvent[13] or,

[12] Act of July 31, 1789, Ch. 5, § 21, 1 Stat. 29, 42; Act of August 4, 1790, Ch. 35, § 45, 1 Stat. 145, 169; Act of May 2, 1792, Ch. 27, § 18, 1 Stat. 259, 263.

[13] *I.e.*, when the debtor, not having sufficient property to pay all of his debts, made a voluntary assignment or when the estate of an absconding, concealed, or absent debtor was attached, or when an act of legal bankruptcy was committed.

in the case of a deceased debtor, where the estate was insufficient to pay all of the debts.[14] This provision was carried forward in R.S. 3466 and codified in 31 U.S.C. 191.[15]

Section 192, which dates back to 1799,[16] is in *pari materia* with 31 U.S.C. 191, *United States* v. *Butterworth Corp.*, 269 U.S. 504, 513, *Bramwell* v. *U.S. Fidelity Co.*, 269 U.S. 483, 490; it subjects to personal liability any person who pays the debtor's debts in knowing disregard of the government's priority under Section 191. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 439; *United States* v. *Crocker*, 313 F. 2d 946, 948 (C.A. 9). See, also, *United States* v. *Oklahoma*, 261 U.S. 253, 259–260.

Both sections, this Court has stated, are to be liberally construed, *United States* v. *Emory*, 314 U.S. 423, 426; *Bramwell* v. *U.S. Fidelity Co.*, 269 U.S. 483, 487; their objectives are not to be defeated "by unnecessarily restricting" the statutory terms "within a narrow or technical meaning." Cf. *Price* v. *United States*, 269 U.S. 492, 500. Thus, the burden is on those claiming exemption from the operation of the statutes to show that they do not come within their provisions. See *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134.

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[14] Act of March 3, 1797, Ch. 20, § 5, 1 Stat. 512, 515.

[15] In bankruptcy matters, the priority conferred on debts of the United States by 31 U.S.C. 191 is incorporated into Section 64a(5) of the Bankruptcy Act, 11 U.S.C. 104a(5). That section is applicable to Chapter XI proceedings. See 8 Collier, *Bankruptcy* (14th ed.), Para. 1.19, p. 39, and Para. 5.33, p. 702.

[16] Act of March 2, 1799, Ch. 22, § 65, 1 Stat. 627, 676. With minor changes, this Act became R.S. 3467, now 31 U.S.C. 192.

B. DISTRIBUTING AGENTS ARE WITHIN THE SCOPE OF 31 U.S.C. 192.

Petitioners rely largely (Br. 18–19) upon *United States* v. *Stephens*, 208 F. 2d 105 (C.A. 5), which held that a court-appointed receiver is beyond the reach of Section 192. In support of its view that the statutory phrase "or other person" refers only to persons standing as personal representatives of the debtor, the Fifth Circuit (208 F. 2d at 108) drew not only upon "the principle of *ejusdem generis* but * * * the language qualifying 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*" [Emphasis in original.] It reasoned that a receiver is not such a personal representative but is to be viewed solely as an "officer or arm of the court." 208 F. 2d at 109. We disagree.

1. To begin with, the Fifth Circuit's analysis gives no weight to the consideration that Section 191 grants the United States priority in respect of all of the debtor's obligations to it, and that the cognate provision (Section 192), if it is to be given a reading consistent with the congressional scheme, must logically embrace all of those fiduciaries who dispose of the debtor's assets in derogation of that priority.

Even if it were permissible, however, to read Section 192 *in vacuo*, the *Stephens* construction would be unwarranted. The Section in terms applies to "[e]very executor, administrator, or assignee, or other person, who pays * * * any debt due by the person or estate for whom or for which he acts * * *." Receivers and distributing agents are persons who pay the debts

of another. And it seems equally clear that, in doing so, they are acting, in the most meaningful sense, for the debtor. Here, for example, King was acting on behalf of the debtor corporation in paying its debts in accordance with the plan of distribution which the corporation had prepared."

The *Stephens* opinion laid stress upon the fact that the receiver there involved was an "officer or arm" of the court. This is invariably true; a receiver either has a court appointment or is the custodian of property under the court's supervision.[18] It does not follow, however, that Congress regarded fiduciaries as persons acting on behalf of the court, instead of for the debtor, within the meaning of Section 192, merely because of their status as court appointees. This is evident from the express inclusion of administrators in the class of persons who pay debts "due by the person or estate for whom or for which he acts." An administrator, in common with a receiver or distributing

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[17] The Ninth Circuit has stated, *United States* v. *Crocker*, 313 F. 2d 946, 949:

"[T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom or for which he acts' should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191."

[18] This Court and the lower federal courts have recognized that a receiver is regarded as an "officer or arm of the court" because of the fact that he acts under a court appointment. See *e.g.*, *Crites, Inc.* v. *Prudential Co.*, 322 U.S. 408, 414; *Bowersock Mills & Power Co.* v. *Joyce*, 101 F. 2d 1000, 1002 (C.C.A. 8); *Phelan* v. *Middle States Oil Corporation*, 154 F. 2d 978, 991 (C.C.A. 2).

agent, acts under a court appointment. Moreover, both administrators and executors (who are also designated *eo nomine* in Section 192) must obtain court approval of their disbursements. Thus, these fiduciaries are also necessarily "officers of the Court". See *e.g.*, *Byers* v. *McAuley*, 149 U.S. 608, 615.

There is no foundation, then, for the Fifth Circuit's exclusion of receivers on principles of *ejusdem generis*. Just as in a real sense an administrator is acting for the decedent's estate—and not the probate court which appointed him—in paying its debts, so, too, the court-appointed receiver or distributing agent acts for the insolvent in satisfying its obligations. That each such fiduciary, by reason of his court appointment or the court's supervision of his acts, may be regarded as an "officer or arm" of the court does not justify the conclusion that he is not also discharging obligations of the decedent or insolvent in a representative capacity.

2. The difficulties in petitioners' suggested reading of Section 192 are brought into still sharper focus when one turns to the underlying legislative purpose. As previously noted, and as petitioners themselves acknowledge (Br. 11), it has long been recognized that Section 192 is in *pari materia* with Section 191. Under petitioners' construction of section 192, however, the government's debt priority established by Section 191 would be unenforceable in the substantial number of instances where the estate of the insolvent debtor is being distributed by a court-appointed fiduciary.

There is nothing in the legislative background of Section 191 to suggest that the extent of the protection accorded to the government's debt priority should turn upon such considerations as whether the debtor's assets are under the control of a fiduciary acting under a court appointment or one selected by the debtor or some third party. Nor is there any basis for imputing to Congress the belief that the debt priority provided by Section 191 is entitled to greater dignity where the debtor is an insolvent decedent's estate rather than (as here) an insolvent corporation. Yet petitoners' theory necessarily draws a distinction between the two classes of debtors.

In the case of an insolvent decedent's estate, the Section 191 debt priority will always enjoy the protection of Section 192. As has been noted, the latter Section expressly applies to "[e]very" executor and administrator, whether designated by the decedent or appointed by the court and without regard to the fact that the administration of the estate is subject to judicial supervision. But where the insolvent estate is that of a living person or corporation, and a receiver or distributing agent rather than an executor or administrator is therefore involved, petitioners would restrict the protection of Section 192 to those situations in which the debt priority was disregarded by a person other than a court-appointed fiduciary.

In contrast to the Fifth Circuit's decision in *Stephens*, both the court below and the Ninth Circuit, see *United States* v. *Crocker*, 313 F. 2d 946, hold that court-appointed distributing agents and receivers come within the statutory terms. Moreover, this

Court and other courts of appeals have enforced Section 192 as against fiduciaries other than those designated by the debtor. For example, in *Bramwell* v. *U.S. Fidelity Co., supra,* this Court upheld the application of Section 192 to a State official charged with the function of liquidating the assets of a bank. And in *United States* v. *Kaplan,* 74 F. 2d 664, the Second Circuit ruled that the section extends to a trustee in bankruptcy.[19]

We submit that Section 192 applies to all fiduciaries, regardless of the source of their authority, to the extent that they are charged with, or undertake the responsbility for, the payment of the debts of an insolvent person or estate. If, in the execution of their responsibility, they knowingly fail to honor the government's debt priority under Section 191—as King was found to have done here—they subject themselves to personal liability.

C. THE DISTRIBUTING AGENT'S LIABILITY UNDER 31 U.S.C. 192 IS NOT AFFECTED BY THE FACT THAT HE COMPLIED WITH A PLAN OF DISTRIBUTION APPROVED BY THE BANKRUPTCY COURT

Alternatively, petitioners suggest (Br. 20) that, even if court-appointed receivers are subject to Section 192, distributing agents are not. In this connection they seek to depict a distributing agent as one possessing the limited role of executing court-

[19] The Fifth Circuit itself, subsequent to *Stephens* and without reference to it, applied Section 192 to an officer-director of a liquidating corporation. *United States* v. *Lutz,* 295 F. 2d 736. While the result in *Lutz* may be reconcilable with that in *Stephens,* it is noteworthy that, unlike in *Stephens,* the court there expressly indicated its awareness that Sections 191 and 192 are in *pari materia.* 295 F. 2d at 742.

approved orders pertaining to the distribution of the insolvent's assets." On this basis, they conclude that he has no independent responsibility upon which the imposition of liability under Section 192 could properly be rested. The argument falls with its premise.

1. Granting that the functions of a receiver may be broader than those of a distributing agent, for purposes of Section 192 no meaningful distinction can be drawn between the two. That Section is concerned with the performance of a single function: the distribution of the assets of an insolvent against whom the government has a priority claim. In this respect, the distributing agent's responsibility is no narrower than that of a receiver. Indeed, in performing his duties he acts in lieu of a receiver or trustee in bankruptcy.

Section 337 of Chapter XI of the Bankruptcy Act (11 U.S.C. 737) provides that, after the acceptance of the arrangement submitted by the debtor, the court or referee is to "appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor." Thus, a distributing agent (*i.e.*, the "other person") is appointed only where there is no appointment of a receiver or trustee. And he has precisely the same duties of receipt and distribution of the debtor's assets, and is subject to the same control by the court, as the receiver or trustee.

2. Nor is it significant that King's distributions to himself and other creditors of Seeley—in disregard of the government's priority—was pursuant to a court-

approved order. Contrary to the implication of petitioners' brief, the bankruptcy court does not (and is not expected to) undertake either to initiate the plan of distribution or to determine *ab initio* whether there are debt priorities which must be taken into account in the distribution. Rather, it is the distributing agent's duty, in submitting the plan of distribution for judicial approval, to apprise the court of any priorities for which provision must be made.

King failed to perform this duty. Although he well knew, as president of the debtor corporation, that the government had a priority claim, the plan of distribution he submitted to the court did not make allowance for it. Thus the approval of the plan by the court (in the exercise of its general supervisory powers over the execution of the Chapter XI arrangement) obviously resulted from a lack of awareness on the court's part of the priority claim—not from any determination by the court, binding upon King, that Section 191 was to be ignored. There is thus no occasion here to consider what the effect of court approval would have been if the court had been informed of the failure to make provision for the priority claim and the government had been given notice of the plan submitted. We acknowledge that in those circumstances court approval might well constitute a defense to an independent action instituted by the United States under Section 192.

However, to permit *pro forma* court approval to serve here as a shield against the imposition of liability under Section 192 would not only frustrate the

Congressional objective of protecting the public revenues but would invite the abuse of the judicial process. A premium would be placed upon the intentional or negligent failure to disclose information which, if available to the court, would have bearing upon the action taken by it.

For these reasons, similar attempts to avoid liability on the strength of court approval of a plan of distribution have been decisively rejected. Thus, in *Field* v. *United States*, 9 Pet. 182, the United States brought suit against the assignees of the creditors of an insolvent debtor. The complaint alleged that the defendants had disposed of the insolvent's property without first satisfying a debt which was due to the United States. It was asserted that the defendants were aware of that debt, which was entitled to priority under the 1799 predecessor of 31 U.S.C. 191. In this Court, the defendants' principal assertion was that their distribution of the insolvent's estate to creditors other than the United States was pursuant to a tableau of distribution which had been confirmed by a court order. They urged that they were obliged to comply with the order of confirmation and to pay the proceeds of the sale of the insolvent's property to the creditors named in the tableau.

In response to this argument, Chief Justice Marshall pointed out that, before the confirmation of the tableau, the defendants had received notice of the debts due the United States. Having such notice, it was their duty "to have made known those debts in

their tableau of distribution, as having * * * priority" 9 Pet. at 201. Accordingly, the Court concluded, the district court had correctly determined that the judicial approval of the tableau of distribution was not a defense to the liability of the defendants.

In reliance on the *Field* decision, *United States* v. *Barnes*, 31 Fed. 705, 707 (S.D.N.Y.), similarly held that "[s]uch is the rigor of the statute that [the assignee in bankruptcy] cannot invoke the judgment of a court of competent jurisdiction directing him to distribute the assets to specified creditors as a justification, when it does not appear that the United States were a party to the proceeding, or that he took proper measures to secure the priority of the United States in the distribution." See, also, *United States* v. *Weisburn*, 48 F. Supp. 393, 397 (E.D. Pa.), holding that where there has been a failure to apprise the court of the government's priority, "neither a discharge of an executor of an insolvent estate, an approval of his account, nor the distribution of assets, relieve him from liability for debts due to the United States." [20]

[20] Petitioners' reliance (Br. 22) upon *In re Empire Shoe Corporation*, 16 F. Supp. 713 (S.D.N.Y.) is misplaced. That case did not involve the responsibility of a distributing agent to bring the existence of a debt priority of the United States to the court's attention. Moreover, the claim of the creditor in *Empire Shoe* had been scheduled for payment and the court determined that the creditor's failure to receive payment was due to its own laxness rather than to misconduct upon the part of the distributing agent. In the present case, there can be no question that the United States was not responsible to any extent for the failure of King to recognize its debt priority.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be affirmed.

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